

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6073

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6073

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY and STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

—against—

FEDERAL TRADE COMMISSION, and MICHAEL PERTSCHUK, Chairman, PAUL RAND DIXON, Member, M. ELIZABETH HANFORD, Member, CALVIN COLLIER, Member and DAVID CLANTON, Member and CAROL M. THOMAS, Secretary; as officers of the FEDERAL TRADE COMMISSION,

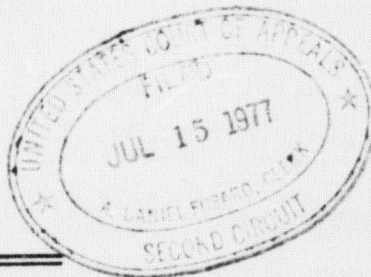
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the Defendants-Appellants.*

DONOVAN LEISURE NEWTON & IRVINE,
Attorneys for Plaintiffs-Appellees,
30 Rockefeller Plaza,
New York, New York 10020.



PAGINATION AS IN ORIGINAL COPY

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DIST/OFFICE	DOCKET		FILING DATE			J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET	
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208-1	75	2748	06	06	75	3	893	1	1				0848		75	2748

PLAINTIFFS

MOBIL OIL CORPORATION
GULF OIL CORPORATION
SHELL OIL COMPANY
STANDARD OIL COMPANY OF CALIFORNIA

DEFENDANTS

Pollack, J.

FEDERAL TRADE COMMISSION
ENGMAN, LEWIS A. Chairman
DIXON, PAUL RAND Member
HANFORD, MARY ELIZABETH Member
NYE, STEPHEN Member
THOMPSON, MAYO J. Member
TOBIN, CHARLES A. Secretary;
as officers of the Federal
Trade Commission

CAUSE

National Environmental Policy Act of 1969, 42 U.S.C. 4321 et. seq. Pltffs. request a declaratory judgment that defts. must prepare and file a statement setting forth the environmental impact of the relief requested in In the Matter of Exxon Corp., a corporation et al., Docket N. 8934, and related relief.

rg

ATTORNEYS

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791-1946

JUDGE CANNELLA

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	JUN 6 1975	JR 865		JS-5	
				JS-6	

75-2748 Judge ~~Potter~~ Mobil Oil Corp. et.al. -vs- Federal Trade Commission, et.al.

CANNELLA, J.

DATE	NR.	PROCEEDINGS
06-06-75	(1)	Filed complaint and issued summons.
06-13-75	(2)	Filed Summons with Marshal's Return. Served Robert J. Lewis by certified Mail - Via Ralph Lee, U.S. Attys Office and Atty Gen. Wash. D.C. Wash., 6/10/75
06-17-75	---	Case re-assigned to Cannella, J.
08-01-75	3	Filed Pltffs' Mobil Oil Corporation's Affidavit and Notice of Motion for an order granting summary judgment in favor of pltffs. ret. 08-20-75.
08-01-75	4	Filed Pltffs' Memorandum in support of pltffs' motion for summary judgment.
08-18-75	5	Filed stip & order extending defts' time to answer from 08-11-75 to 09-11-75. So ordered- CANNELLA, J.
08-29-75	6	Filed stip & order extending defts' time to respond to pltffs' motion for summary judgment from 08-14-75 to 09-11-75. So ordered- CANNELLA, J.
09-15-75	7	Filed defts notice of motion to dismiss the complaints and for an order granting summary judgment. Ret. 09-25-75.
09-15-75	8	Filed defts memorandum of law in opposition to Pltffs motion for summary judgment and in support of defts motion to dismiss or, in the alternative, for summary judgment.
09-29-75	9	Filed stip & order extending pltffs' time to respond to defts' motion to dismiss, etc. from 09-22-75 to 10-16-75. So ordered- CANNELLA, J.
10-16-75	10.	Filed Pltffs Mobil Oil Corporation's Memorandum in opposition to Defts' motion to dismiss etc.
10-31-75	11.	Filed defendant's memorandum in opposition to Pltff's motion for summary judgment and in support of deft's motions for summary judgment.
03-02-77	(12)	Filed Opinion # 45551-- for the reasons stated, pltffs' motion for summary judgment is granted. Defts' motions to dismiss the complaint and, alternatively, for summary judgment are denied. Pursuant to this grant of summary judgment in favor of the pltffs, FRCP 56, the Commission is hereby ordered immediately to begin compliance with the section's mandate by preparing a draft environmental impact statement. So ordered- CANNELLA, J. (m/n)
03-04-77	(13)	Filed Erratum--- The Opinion of the Court dated March 1, 1977 is hereby revised by amending the first line of the last paragraph on page to to read as indicated. So ordered- CANNELLA, J. (m/n)
03-07-77	(14)	Filed Order to Show Cause of pltff Mobil Oil Corporation why an order should not be entered enjoining the Federal Trade Commission, etc. from taking any further action in the FTC adjudicative proceeding F.T.C. etc. RET: 3-9-77 at 10:00 A.M. in Room 1001.
03-07-77	(15)	Filed Pltff's Mobil Oil Corporation Memorandum in support of motion for further injunctive relief.
03-15-77	(16)	Filed Memorandum-- for the reasons stated, pltffs' motion to stay the administrative proceedings pending the FTE's compliance with this Court's order of March 2, is denied. The FTC is ordered to prepare and distribute a draft EIS by 9-12-77 and to submit a report on the Commission's progress in preparing the draft on 7-11-77, or any time sooner. The Court expects that the various agencies to which the draft EIS is submitted will recognize the priority of this matter and act accordingly. So ordered- CANNELLA, J. (m/n)
04-25-77	(17)	Filed Defts NOTICE OF APPEAL to USCA 2nd Circuit from From Opinion filed 3-2-77 and Memorandum Decision filed 3-15-77. Copy of Notice mailed to: Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza. New York, N.Y. 10017 -attys for Pltff.

CONTINUED ON PAGE NO. 3.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF MOBIL OIL CORPORATION, ETAL		DEFENDANT FEDERAL TRADE COMMISSION, ETAL CANNELLA, J	75 CIV 2748 DOCKET NO PAGE 3 OF ____ PAGES
DATE	NR.	PROCEEDINGS	
04-26-77	(18)	Filed Defts Order to Show Cause for an order staying the order filed 3-2-77, and the supplemental order filed 3-15-77 re:draft EIS by 9-12-77., at 10:00 A.M. on 4-29-77 in Room 1105.	
04-26-77	(19)	Filed Defts Memorandum of Law in support of the application for a stay pending appeal.	
04-28-77	(20)	Filed Pltffs' Opposition to the Government's application for a stay pending appeal.	
04-28-77	(21)	Filed Pltffs Affidavit in support of their opposition to stay pending appeal. by Andrew J. Kilcarr.	
05-03-77	(22)	Filed Memorandum-Decision-- for the reasons stated, the Court, although realizing that a reversal on appeal is more than a remote possibility, finds that the Government has not made a sufficient showing for a stay pending appeal, and the motion is hereby denied. So ordered- CANNELLA, J. (m/n)	
05-31-77	(23)	Filed transcript of record of proceedings, dated 3-9-77	
05-31-77	(24)	Filed transcript of record of proceedings, dated 4-29-77	
05-31-77	(25)	Filed Govts memorandum of law in opposition to pltffs application for post judgment injunctive relief....	
06-03-77	(26)	Filed notice that the record on appeal has been certified and transmitted to the USCA this day.	

A TRUE COPY
RAYMOND F. BUECHARDT, Clerk

By *[Signature]*
Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
MOBIL OIL CORPORATION,
GULF OIL CORPORATION,
SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,
:

Plaintiffs,
:

-against-
:

FEDERAL TRADE COMMISSION; and
LEWIS A. ENGMAI, Chairman,
PAUL RAND DIXON, Member,
MARY ELIZABETH HANFORD, Member,
STEPHEN NYE, Member, and MAYO J.
THOMPSON, Member and CHARLES A.
TOBIN, Secretary; as officers of
the FEDERAL TRADE COMMISSION,
:

Defendants.
:
----- x

75 Civ. 2748

JUDGE POLLACK

Civil Action No.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

The above named plaintiffs bring this civil action
against the above named defendants and complain and allege as
follows:

COUNT I

I. Jurisdiction and Venue

1. This action arises under the National Environ-
mental Policy Act of 1969, 42 U.S.C. § 4321 et seq. ("NEPA").

2. Jurisdiction is vested in this Court by virtue
of the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202,
sections 1331(a), 1361 and 1651 of the Judicial Code, 28 U.S.C.
§§ 1331(a), 1361 and 1651 and section 10 of the Administrative
Procedure Act, 5 U.S.C. §§ 701-706.

(1)

3. Plaintiffs have exhausted all administrative remedies available for the protection of their rights and have no prompt, adequate and effective remedy at law.

4. Plaintiff Mobil Oil Corporation resides and has its principal place of business in the Southern District of New York and venue is therefore proper in this Court pursuant to section 1391 of the Judicial Code, 28 U.S.C. § 1391.

5. Plaintiffs seek by this action a declaratory judgment that In the Matter of Exxon Corporation, et al., FTC Docket No. 8934 ("Exxon") is a major federal action significantly affecting the quality of the human environment; a declaratory judgment that section 1.82(d) of the Commission's Rules of Practice is invalid; an order compelling defendants to file an environmental impact statement; and an order compelling conduct by defendants in accordance with plaintiffs' rights as adjudicated herein.

6. Each of the plaintiffs is a corporation, with its state of incorporation and principal place of business as listed below:

	<u>Plaintiff</u>	<u>State of Incorporation</u>	<u>Principal Place of Business</u>
1.	Mobil Oil Corporation	New York	New York, N. Y.
2.	Gulf Oil Corporation	Pennsylvania	Pittsburgh, Pennsylvania
3.	Shell Oil Company	Delaware	Houston, Texas
4.	Standard Oil Company of California	Delaware	San Francisco, California

7. Defendant Federal Trade Commission ("Commission", "FTC") is a Federal agency organized and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., as

amended, and is located at 6th and Pennsylvania Avenue, N.W., Washington, D. C.

8. Defendant Lewis A. Engman is Chairman and defendants Paul Rand Dixon, Stephen Nye, Mary Elizabeth Hanford, and Mayo J. Thompson are members of the Federal Trade Commission, each having been duly appointed by the President of the United States and having taken oath and entered upon the duties of a member of the Commission, and each is now a duly qualified and voting member of the Commission pursuant to statute. Defendant Charles A. Tobin is Secretary of the Federal Trade Commission and is a duly qualified officer and employee of the Federal Trade Commission.

III. Nature of the Controversy

9. On July 18, 1973 the Commission issued a complaint which charges plaintiffs and four other oil companies with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. No relief was specified in the Exxon complaint.

10. In their Prediscovery Statement filed on February 22, 1974, Commission counsel in support of the complaint stated that they would seek, among other forms of relief in Exxon:

- (1) The divestiture of 40 to 60 percent of respondents' refinery capacity in the relevant market and the establishment of 10 to 13 new firms;
- (2) The divestiture of all crude and product pipelines which connect directly to the new firms and are owned and operated by the refining department of the parent; and
- (3) The transfer to the new firms of fractional ownership shares in connecting joint venture pipelines.

11. Because this relief would directly and substantially affect the environment, by letter dated April 16, 1974 to the Administrative Law Judge, respondents requested, inter alia, permission to file a brief in support of the motions which raised the issue as to whether the Commission is obligated under NEPA to file an impact statement in Exxon. That request was granted and, pursuant to the May 23, 1974 Order of the Law Judge, the Memorandum In Support Of Respondents' Motion To Require Complaint Counsel To File An Environmental Impact Statement Or, In The Alternative, For Immediate Certification To The Commission ("motion") was filed on June 17, 1974 on behalf of all respondents.

12. In their Memorandum, respondents demonstrated that the relief requested by complaint counsel would constitute a "major Federal action significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of NEPA and that under that statute, complaint

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counsel are therefore required to file an environmental impact statement.

13. Complaint counsel based their opposition to this motion on § 1.82(d) of the Commission's Rules of Practice which provides in part:

Nothing in this procedure shall be construed as stating or implying that the requirements of section 102 (2)(C) of [NEPA] apply to: . . . any adjudicatory proceedings commenced by the Commission.

They contended that this expression of Commission policy was binding on the Administrative Law Judge and the Law Judge agreed.

14. On February 5, 1975 the Administrative Law Judge entered his Order Denying Motion Of Respondents To Require Complaint Counsel To File Environmental Impact Statement Or, In The Alternative, For Immediate Certification To The Commission. In that Order, the Law Judge stated that he had not ruled independently on the merits of the motion but had followed the dictates of § 1.82(d). Having so ruled, he found "no basis for respondents' alternative request to certify respondents' motion to the Commission." (Order, p. 2).

15. A request for leave to appeal was filed on February 18, 1975. In that request it was argued that all of the requirements of section 3.23(b) of the Commission's Rules of Practice had been met and that leave should therefore be granted to appeal the Order to the Commission. That request was denied on February 25, 1975.

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16. Thereafter, a request for review was made directly to the Commission through Respondents' Petition For Extraordinary Review By The Commission Of Administrative Law Judge's Order Denying Respondents' Motion To Require Complaint Counsel To File Environmental Impact Statement, filed on March 6, 1975. That petition, in which it was argued that the Administrative Law Judge erred by failing to certify respondents' motion, was denied on April 29, 1975.

IV. The Applicability of NEPA

17. Through NEPA, Congress has made environmental protection a matter of national policy:

"... it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . , to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a).

This policy is implemented through NEPA's directive, in Section 101(b), that all agencies of the Federal Government "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" to insure appropriate consideration of environmental values.

18. Section 102 of the Act, 42 U.S.C. § 4332, specifies the procedures designed by Congress to insure that Federal agencies consider the environmental consequences of their actions. Under that provision, all agencies are required to inter alia:

utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's

identify and develop methods and procedures, . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; * * *

study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; 42 U.S.C. §§ 4332(2)(A), (B) and (D).

19. Those procedures apply to a proposed agency action regardless of the magnitude of the action required or the extent of the environmental impact. Additionally, when major Federal actions with significant environmental effects are proposed, the more stringent procedures of Section 102(2)(C) are required. That provision requires consultation with other agencies having jurisdiction over or special expertise with respect to the environmental impact involved. It also makes agency statements on the environment available for examination by interested members of the public and directs that all agencies of the Federal Government shall:

"include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved

in the proposed action should it be implemented.

20. Exxon is a "major Federal action significantly affecting the quality of the human environment." The relief which is complaint counsel's objective in Exxon includes substantial divestiture of respondents' pipelines and refinery capacity. The impact of that relief on the environment would be both significant and unavoidable and would be in terms, for example, of the substantial new construction which would inevitably result and the direct effects of divestiture on the exploration for and production of oil, a critical and depletable natural resource, and on the supply, distribution and use of that resource.

21. Defendants have failed and are failing to comply with the requirements of Section 102(2)(C) of NEPA by virtue of their failure to prepare a detailed statement on:

- (i) the environmental impact of the relief contemplated by the Commission;
- (ii) any adverse environmental effects of that relief which cannot be avoided;
- (iii) alternatives to the proposed relief;
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, which would be affected by the divestiture sought;
- (v) any irreversible and irretrievable commitments of resources involved in the implementation of the relief requested.

COUNT II

22. Paragraphs 1 through 19 above are repeated, re-alleged and incorporated herein by reference.

23. In its Rules of Practice, the Commission has recognized that NEPA applies to its activities. Section 1.82(a), for example, provides that environmental impact statements must be prepared for every rule or guide "which constitutes a major action significantly affecting the quality of the human environment." Section 1.82(d), however, purports to exempt adjudicatory proceedings from NEPA and provides in part:

Nothing in this procedure shall be construed as stating or implying that the requirements of section 102(2)(C) of [NEPA] apply to:... any adjudicatory proceedings commenced by the Commission.

24. On December 6, 1973 the Commission proposed revisions in its rules implementing NEPA, with no changes proposed in section 1.82(d). By letter dated January 21, 1974, counsel for Mobil Oil Corporation supplied extensive comments to the Commission, and, emphasizing the lack of a statutory basis for the exemption relating to adjudicatory proceedings, stated in part:

[T]he Commission's proposed procedures fall short of providing thorough consideration and evaluation of environmental factors as contemplated by [NEPA] in that 1) the proposed decision of the Commission to retain section 1.82(d) will continue to exclude a significant portion of its activities from any consideration of their environmental impact . . .

* * *

The basic thrust of NEPA is to subject all forms of agency activity to a consideration and evaluation of possible environmental impact prior to a final agency decision. Congress was fully aware of the fact that most federal agencies asserted a lack of authority to consider environmental consequences during their decision-making process. It was with knowledge of this fact, combined with the emerging necessity of assuring environmental

protection from actions of the federal government, that Congress specifically demanded in NEPA section 102, that all federal agencies, to the fullest extent possible, implement the policy and procedural requisites enumerated therein. This is evidenced by the statement of the Senate and House conferees concerning their intent in adopting the phrase "to the fullest extent possible":

"... the purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in ... [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."

"... the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the Directives set out in said Section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." (emphasis supplied)

Thus, the Act's legislative history makes clear the only limitations intended by Congress for application of NEPA directives to federal agency actions, i.e. express statutory exclusion or demonstrated impossibility of compliance. Neither in the language of NEPA nor in its legislative history is there an exception stated or suggested based on the nature of the agency activity involved, irrespective of its environmental effects.

The particular obligation created by NEPA section 102(2)(C) and imposed on all federal agencies, to which section 1.82 addresses itself, is the requirement to draft, in certain situations, an environmental impact statement. The determination of whether an agency action requires an impact statement is clearly not based on standards delineating whether the action is of the type reached by NEPA. The intent of section 102(2)(C) is to segregate out from the general class of agency actions those that are considered to have the possibility of significant environmental impact. This is in line with the conclusion stated above that all forms of agency action are subject to NEPA.

Section 1.82(d) unnecessarily and improperly eliminates a class of Commission action not because they are free from environmental effects but apparently based on the type of activity involved. As previously stated, there is no basis in NEPA for such an exception. This is necessarily so, for Congress was

attempting, through NEPA, to remedy a perceived defect in the way agency decisions were made, which, historically, balanced economic or technological factors to the exclusion of environmental considerations.

25. The FTC did not take this opportunity to explain the basis on which the exemption was claimed but instead, by letter dated December 23, 1974, simply responded:

Section 1.82(d) is carried over from the Commission's previous Rules concerning NEPA, and, although the Commission has reexamined this provision in light of the comments received, it continues to hold the view stated in § 1.82(d).

26. On April 4, 1975, the Commission again announced proposed revisions to its Rules of Practice and again, no changes have been proposed in section 1.82(d). 40 Fed. Reg. 15233.

27. Through section 1.82(d), the defendants purport to withdraw an entire category of their activities from the operation of NEPA, regardless of the extent of the impact which those activities will have on the environment. Defendants have no authority to create for themselves such an exception to a Federal statute and section 1.82(d), which provides for that exception, is in direct conflict with NEPA and is therefore invalid.

PRAYER

WHEREFORE, plaintiffs respectfully request that this Court:

(A) Issue a declaratory judgment that In the Matter of Exxon Corporation, a corporation et al., Docket No. 8934 is a "major Federal action significantly affecting the quality of the human environment";

(B) Issue a declaratory judgment that section 1.82(d) of the Commission's Rules of Practice is invalid;

(C) Enter an order requiring defendants to prepare and file a statement setting forth the environmental impact of the relief proposed in Exxon;

(D) Grant such other and further relief as to this Court may seem just and proper.

Dated: June 6, 1975

DONOVAN LEISURE NEWTON & IRVINE

By Theodore S. Hope Jr.
Theodore S. Hope, Jr.

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San Francisco, California 94104

Attorney for Plaintiff
STANDARD OIL COMPANY OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MOBIL OIL CORPORATION,	:	
GULF OIL CORPORATION,	:	
SHELL OIL COMPANY and	:	
STANDARD OIL COMPANY OF	:	75 Civ. 2748 (JMC)
CALIFORNIA	:	
Plaintiffs,	:	
v.	:	
FEDERAL TRADE COMMISSION: and	:	
LEWIS A ENGMAN, Chairman,	:	
PAUL RAND DIXON, Member,	:	
MARY ELIZABETH HANFORD, Member,	:	
STEPHEN NYE, Member and	:	
MAYO J. THOMPSON, Member and	:	
CHARLES A. TOBIN, Secretary;	:	
as officers of the FEDERAL	:	
TRADE COMMISSION,	:	
Defendants.	:	

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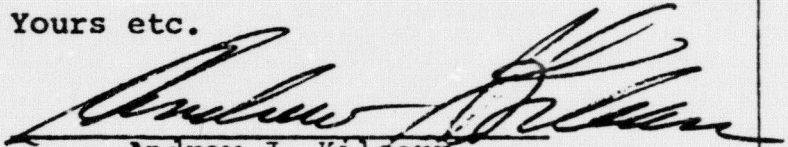
S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Andrew J. Kilcarr, the statement pursuant to Rule 9(g) of the General Rules of this Court and the accompanying Memorandum In Support, the undersigned will move this Court at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, in Room 1001 thereof, on the 20th day of August, 1975 at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of plaintiffs and for such

further relief as to this Court may seem just and proper.

Dated: New York, New York
August 1, 1975

Yours etc.



Andrew J. Kilcarr

DONOVAN LEISURE NEWTON & IRVINE
1666 K Street, N. W.
Washington, D. C. 20006
Tel. (202) 785-8900

Counsel for Plaintiff
Mobil Oil Corporation

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MOBIL OIL CORPORATION,	:	
GULF OIL CORPORATION,	:	
SHELL OIL COMPANY and	:	
STANDARD OIL COMPANY OF	:	75 Civil 2748 (JMC)
CALIFORNIA,	:	
Plaintiffs,	:	
v.	:	
FEDERAL TRADE COMMISSION; and	:	<u>AFFIDAVIT</u>
LEWIS A. ENGMAN, Chairman,	:	
PAUL RAND DIXON, Member,	:	
MARY ELIZABETH HANFORD, Member,	:	
STEPHEN NYE, Member and	:	
MAYO J. THOMPSON, Member and	:	
CHARLES A. TOBIN, Secretary;	:	
as officers of the FEDERAL	:	
TRADE COMMISSION,	:	
Defendants.	:	

----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ANDREW J. KILCARR, being duly sworn, deposes and says:

1. I am a member of the firm of Donovan Leisure Newton & Irvine, counsel to plaintiff Mobil Oil Corporation ("Mobil") in the above entitled action. I am familiar with the facts and proceedings herein and I submit this affidavit in support of plaintiffs' motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment.

2. This action is brought pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. ("NEPA") to enforce compliance with the dictates of that Act.

3. On July 18, 1973, defendants herein issued a complaint styled In the Matter of Exxon Corporation, et al., Docket

No. 8934 ("Exxon") against plaintiffs and four other oil companies charging them with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

4. In their Prediscovery Statement filed on February 22, 1974, Commission counsel in support of the complaint in Exxon challenge certain of respondents' alleged activities including joint ventures in transport and in on-shore and off-shore lease bidding. They state that they will seek substantial divestiture of respondents' pipelines and refinery capacity and the relief they propose includes:

- (1) The divestiture of 40 to 60 percent of respondents' refinery capacity in the relevant market and the establishment of 10 to 13 new firms;
- (2) The divestiture of all crude and product pipelines which connect directly to the new firms and are owned and operated by the refining department of the parent; and
- (3) The transfer to the new firms of fractional ownership shares in connecting joint venture pipelines.

5. Because this relief would, if effectuated, have a substantial and direct effect upon the environment, respondents moved to require complaint counsel to file a statement setting forth the environmental impact of that relief and on June 17, 1974 a joint memorandum in support of that motion was submitted.

(Memorandum In Support Of Respondents' Motion To Require Complaint Counsel To File An Environmental Impact Statement Or, In the Alternative, For Immediate Certification To The Commission).

6. In their June 17 memorandum, respondents argued that the ultimate relief requested by complaint counsel would constitute "major Federal action significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of NEPA and that the Commission was therefore required to file an environmental impact statement. More specifically, respondents argued that the proposed relief had serious environmental implications in at least five significant areas:

- a) the divestiture of refineries could very well stimulate construction of additional refineries;
- b) the divestiture of pipelines could likewise stimulate construction of various new pipelines;
- c) the elimination of joint ventures and cooperative measures in the transport area could cause increased and overlapping transport, with attendant decreases in efficiency and increases in pollution and other aggravations;
- d) the elimination of joint ventures in lease bidding, both on-shore and off-shore, could very well increase the number of drillings made;
- e) complaint counsel's hoped-for decrease in the investment in foreign exploration and production and increase in those activities domestically would, by its very terms, change the scope and speed with which domestic reserves are developed and depleted, thereby affecting vital supplies of natural resources.

7. Respondents' motion and its request for certification were denied by the Administrative Law Judge on February 5, 1975. In his Order, the Administrative Law Judge stated that

he was following the dictates of Section 1.82(d) of the Commission's Rules of Practice which provides in part:

Nothing in this procedure shall be construed as stating or implying that the requirements of Section 102(2)(C) of [NEPA] apply to: . . . any adjudicatory proceedings commenced by the Commission.

8. A request for leave to appeal was filed on February 18, 1975 and was denied by the Law Judge on February 25, 1975.

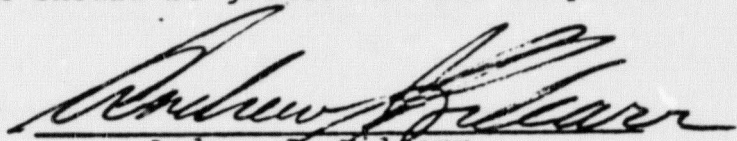
9. Thereafter, review was sought directly with the Commission (Respondents' Petition For Extraordinary Review By The Commission Of Administrative Law Judge's Order Denying Respondents' Motion To Require Complaint Counsel To File Environmental Impact Statement, filed on March 6, 1975). That petition to the Commission, which argued both the need for an impact statement in Exxon and the invalidity of Section 1.82(d), was denied on April 9, 1975 and all of plaintiffs' administrative remedies have been exhausted.

10. The complaint in this action was filed on June 6, 1975.

11. A statement pursuant to Rule 9(g) of the General Rules of this Court is attached.

WHEREFORE, it is respectfully submitted that there is no genuine issue as to any material fact and that plaintiffs'

motion for summary judgment should be granted in all respects.


Andrew J. Kilcarr

DONOVAN LEISURE NEWTON & IRVINE
1666 K Street, N.W.
Washington, D.C. 20006
Telephone (202) 785-8900

Counsel for Plaintiff
Mobil Oil Corporation

Sworn to before me this

31st day of July, 1975.


Notary Public

RUTH FLEURY
Notary Public, State of New York
No. 24-40-0920
County of Kings County
City of New York
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x

MOBIL OIL CORPORATION,	:	
GULF OIL CORPORATION,	:	
SHELL OIL COMPANY and	:	
STANDARD OIL COMPANY OF	:	
CALIFORNIA,	:	75 Civ. 2748 (JMC)
Plaintiffs,	:	
v.	:	
FEDERAL TRADE COMMISSION; and	:	STATEMENT PURSUANT
LEWIS A. ENGMAN, Chairman,	:	<u>TO LOCAL RULE 9(g)</u>
PAUL RAND DIXON, Member,	:	
MARY ELIZABETH HANFORD, Member,	:	
STEPHEN NYE, Member and	:	
MAYO J. THOMPSON, Member and	:	
CHARLES A. TOBIN, Secretary;	:	
as officers of the FEDERAL	:	
TRADE COMMISSION,	:	
Defendants.	:	

----- x

In accordance with Rule 9(g) of the General Rules of this Court, plaintiffs submit that there is no genuine issue to be tried with respect to the following material facts.

1. Defendant Federal Trade Commission ("Commission") is a Federal agency organized and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et. seq., and is situated at 6th and Pennsylvania Avenue, N. W., Washington, D. C.

2. Defendant Lewis A. Engman is Chairman and defendants, Paul Rand Dixon, Mayo J. Thompson, Mary Elizabeth Hanford, and Stephen Nye are duly qualified and voting members of the Commission pursuant to statute, and Charles A. Tobin is the Secretary of the Commission.

3. On July 18, 1973 the defendants issued a complaint styled In the Matter of Exxon Corporation, et al., Docket No. 8934 in ("Exxon") against plaintiffs herein and four other oil companies charging them with violations of Section 5 of the

Federal Trade Commission Act, 15 U.S.C. § 45.

4. In their Prediscovery Statement filed on February 22, 1974 Commission counsel supporting the complaint in Exxon challenge certain of respondents' alleged activities including processing and exchange agreements and joint ventures in on-shore and off-shore lease bidding. They state that the relief they will seek includes the divestiture of 40 to 60% of respondents' refinery capacity in the relevant market and the establishment of 10 to 13 new firms; the divestiture of all crude and product pipelines which connect directly to the new firms and are owned and operated by the refining department of the parent; the transfer to the new firms of fractional ownership shares in connecting joint venture pipelines.

5. By its terms, Section 102(2)(C) of NEPA applies to all agencies of the Federal Government and requires that they prepare environmental impact statements for "major Federal actions significantly affecting the quality of the human environment."

6. Defendants have not filed a statement setting forth the environmental impact of the relief proposed in Exxon.

7. Section 1.82(d) of the Commission's Rules of Practice provides in part:

Nothing in this procedure shall be construed as stating or implying that the requirements of Section 102(2)(C) of [NEPA] apply to: . . . any adjudicatory proceedings commenced by the Commission.

8. The Commission has taken the position that its adjudicatory proceedings, including Exxon, are exempt from the requirements of Section 102(2)(C) of NEPA.

9. The Federal Trade Commission is an agency of the Federal Government to which Section 102(2)(C) applies.

10. If ordered, the relief sought by Commission counsel supporting the complaint would constitute "major Federal action."

11. The relief sought by complaint counsel will, if granted, significantly affect the quality of the human environment.

12. Adjudicatory proceedings commenced by the Commission are Federal actions subject to NEPA when their scope and impact on the environment are significant.

13. Section 1.82(d) of the Commission's Rules of Practice is in conflict with NEPA.

14. Complaint counsel are required by Section 102(2) (C) of NEPA to comply with all applicable provisions of that section and are required to file a detailed statement on the environmental impact of the relief proposed in Exxon.

Dated: August 1, 1975.

Of Counsel:

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Counsel for Plaintiff
Standard Oil Company of California

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 9-15-75
S.D. of NEW YORK

MOBIL OIL CORPORATION, et al.,

Plaintiffs,

- v -

FEDERAL TRADE COMMISSION, et al.,

Defendants.

NOTICE OF MOTION

75 Civ. 2748 (JMC)

S I R S :

PLEASE TAKE NOTICE that upon the annexed Rule 9(g) Statement and upon all prior proceedings, defendants will move this Court in Room 1001 on September 25, 1975, in the United States Courthouse, Foley Square, New York, New York, at 10:00 o'clock in the forenoon for: (1) an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to issue as to any material fact; and (3) such other and further relief as is just.

Dated: New York, New York

September 11, 1975.

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

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One St. Andrews Plaza
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Telephone: 212-791-1946

TO: ANDREW J. KILCARR, Esq.
DONOVAN LEISURE NEWTON & IRVINE
1666 K Street, N. W.
Washington, D. C. 20006

Counsel for Plaintiff
Mobil Oil Corporation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MOBIL OIL CORPORATION et al.,	:	
Plaintiffs,	:	<u>RULE 9(g) STATEMENT</u>
- v -	:	75 Civ. 2748 (JMC)
FEDERAL TRADE COMMISSION et al.,	:	
Defendants.	:	

-----X

STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, defendants submit the following statement of material facts as to which they contend there is no genuine issue.

(1) Each of the plaintiffs herein is a corporation with its state of corporation and principal place of business as listed below:

<u>Plaintiff</u>	<u>State of Corporation</u>	<u>Principal Place of Business</u>
1. Mobil Oil Corporation	New York	New York, New York
2. Gulf Oil Corporation	Pennsylvania	Pittsburgh, Pennsylvania
3. Shell Oil Company	Delaware	Houston, Texas
4. Standard Oil Company of California	Delaware	San Francisco, California

A-30

(2) Defendant Federal Trade Commission ("Commission") is a federal agency authorized and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., as amended, with its principal offices at 6th Street and Pennsylvania Avenue, N.W., Washington, D.C.

(3) Defendant Lewis A. Engman is Chairman and defendants Paul Rand Dixon, Stephen Nye, Mary Elizabeth Hanford and Mayo J. Thompson are members of the Commission, each having been duly appointed by the President of the United States and having taken oath and entered upon the duties of a member of the Commission, and each is now a duly qualified and voting member of the Commission pursuant to statute. Defendant Charles A. Tobin is Secretary of the Commission and is a duly qualified officer and employee thereof.

(4) On July 18, 1973, the Commission issued a complaint which charges plaintiffs and four other oil companies with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

(5) Section 1.82(d) of the Commission's Rule of Practice and Procedure, 16 C.F.R. § 1.82(d), provides in part:

Nothing in this procedure shall be construed as saying or implying that the requirements of section 102(2)(C) of *NEPAI apply to: . . . in the adjudicatory proceedings commenced by the Commission.

(6) The complaint issued by the Commission against plaintiffs and four other oil companies is currently pending in adjudicatory proceedings before an Administrative Law Judge of the Commission.

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(7) By letter dated February 10, 1975 and accompanying advisory memorandum dated January 31, 1975, the Council on Environmental Quality, in response to a request of the Commission, advised the Commission of its views regarding the application of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., to law enforcement activities of the Commission. Said letter and advisory memorandum are annexed hereto as Exhibits A and B respectively.

Dated: New York, New York

September 11, 1975

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants.

By: 

NATHANIEL L. GERBER
Assistant United States Attorney
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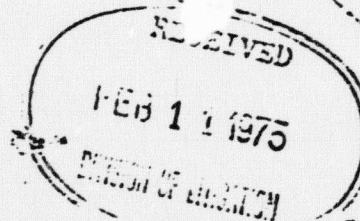
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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY ATTORNEY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

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S. D. N. Y.

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JF 2/4/75

February 10, 1975

Mr. Calvin Collier
General Counsel
Federal Trade Commission
Washington, D.C. 20580



Re: Gifford-Hill & Co., Inc. v. Federal
Trade Commission, et al., Civil Action
No. 74-2024 (D.C. Cir.)

Dear Mr. Collier:

This is in response to your request for our views on the application of the National Environmental Policy Act to law enforcement activities of the Federal Trade Commission. As set forth in the attached memorandum, the Council on Environmental Quality is of the opinion that

- (1) your regulation at 16 C.F.R. § 1.82(d), essentially exempting the FTC's adjudicatory proceedings to enforce the anti-trust laws from the environmental impact statement process, and
- (2) your determination that no impact statement is required in connection with the FTC's continuing use of its "Cement Guidelines,"

are both consistent with the National Environmental Policy Act.

Sincerely,

Russell W. Peterson

Russell W. Peterson
Chairman

Attachment

EXHIBIT "A"

January 31, 1975

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COUNCIL ON ENVIRONMENTAL QUALITY

ADVISORY MEMORANDUM

Application of the National Environmental Policy
Act to Enforcement of the Anti-Trust Laws by the
Federal Trade Commission

The Federal Trade Commission has requested the Council on Environmental Quality's views on the application of the National Environmental Policy Act (NEPA),^{1/} to certain of its enforcement activities under the Clayton Act^{2/} and the Federal Trade Commission Act.^{3/} This issue is now pending before the U.S. Court of Appeals for the District of Columbia in Gifford-Hill & Company, Inc. v. Federal Trade Commission, et al., No. 74-2024.

THE COUNCIL ON ENVIRONMENTAL QUALITY

The Council on Environmental Quality was established pursuant to Title II of NEPA, and charged with, inter alia, reviewing the activities of federal agencies in light of the environmental policies of the Act. The Council's opinion

1/ 42 U.S.C. §§ 4321, et seq.

2/ 15 U.S.C. §§ 12 et seq.

3/ 15 U.S.C. §§ 41 et seq.

EXHIBIT "B"

is provided in accordance with that mandate. See, in particular, 42 U.S.C. §§ 4341(4) and 4344(3).⁴

The opinion is also provided pursuant to the Environmental Quality Improvement Act of 1970,⁴ and Executive Order 11514.⁵ Section 203(d) of the Environmental Quality Improvement Act, 42 U.S.C. § 4372(d), directs the Council, inter alia, to appraise agency programs which affect the quality of the environment. Section 3(a) of Executive Order 11514 directs the Council to evaluate, in particular, policies and activities of the Federal government which are aimed at the accomplishment of non-environmental objectives but which affect environmental quality. Section 3(h) of Executive Order 11514 also directs the Council to issue guidelines to Federal agencies for the preparation of environmental impact statements.

These enabling authorities have most recently been discussed in Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 41 L. Ed 2d 654, motion to vacate denied, ___ U.S. ___,

⁴ 42 U.S.C. §§ 4371, et seq.

⁵ Executive Order 11514, Mar. 5, 1970, 35 F.R. 4247, 42 U.S.C. § 4321 (1970).

41 L. Ed 2d 1156 (1974). According to that opinion, the Council on Environmental Quality is the organization "most intimately familiar with environmental issues and the requirements of the National Environmental Policy Act" 417 U.S. at 1304, and "ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements." 417 U.S. at 1310. See, also, EDF v. TVA, 468 F.2d 1164 (6th Cir. 1974) and Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973).

While this opinion is based, in the first instance, on the Council's review of the relevant statutes, their legislative history, and the judicial opinions construing them, the Council has supplemented its review of the law with the background and experience accumulated by it over the last five years in coordinating the Federal government's overall implementation of NEPA.

Since the passage of NEPA, the Council has received approximately 6,000 draft and 4,000 final statements and

reviewed a significant number of them, issued four sets of successively more detailed guidelines on the operation of the impact statement process,^{6/} and assisted almost 60 Federal agencies in the development of their NEPA procedures. All environmental impact statements are filed with the Council, and the Council publishes a weekly listing and a monthly report on the impact statements which have been received. The Council engages, either using its own staff or through consultants, in research on the operation of the impact statement process; and pursuant to NEPA, the Council annually reports to the President and the Congress on the state of the nation's environment. Two of the last three of these Annual Reports have dealt in detail with the implementation of the environmental impact statement process.^{7/} This opinion reflects in part the experience accumulated by the Council as a result of this activity.

^{6/} The most recent set of guidelines issued by the Council appears at 40 C.F.R. Part 1500 (1974).

^{7/} See, CEQ, Environmental Quality: Third Annual Report (1972) and Fifth Annual Report (1974).

FACTUAL BACKGROUND

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Gifford-Hill is a corporation principally engaged in the production and sale of construction materials, including portland cement, ready-mixed concrete, construction aggregates,^{8/} and concrete products. In 1967, 1970, and 1972, it acquired a series of companies in the cement industry. In May 1974, the FTC notified Gifford-Hill that, in its view, these acquisitions violated the anti-trust laws and the FTC's guidelines on vertical mergers in the cement industry (its "Cement Guidelines").^{9/} Subsequently, in August 1974, the FTC issued a formal complaint against Gifford-Hill seeking, inter alia, divestiture of Becker Sand and Gravel Company and a ten-year bar on acquisitions by Gifford-Hill, without prior FTC approval, of firms manufacturing and/or selling construction aggregates.^{10/}

^{8/} Construction aggregates are sand, gravel, and crushed stone. They constitute the ingredients, along with cement, of cement products, such as ready-mixed concrete.

^{9/} The full text of the FTC's "Enforcement Policy With Respect to Vertical Mergers in the Cement Industry" (its "Cement Guidelines") appears in Appendix A.

^{10/} See, Administrative Complaint, In the Matter of Gifford-Hill & Co., Inc., Docket No. 8989, before the Federal Trade Commission.

Shortly after the issuance of the complaint, Gifford-Hill filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment, injunctive relief, and mandamus against the FTC on the ground that the FTC had not complied with the requirements of the National Environmental Policy Act. Gifford-Hill challenged, in particular, the FTC's regulation at 16 C.F.R. § 1.82(d)^{11/} essentially exempting the FTC's initiation of adjudicatory proceedings from the environmental impact statement process, and the FTC's determination that no impact statement is required in connection with its continuing implementation of its Cement Guidelines.

On November 13, 1974, in a memorandum opinion by Judge Gasch, the District Court denied Gifford-Hill's motion for a preliminary injunction. Gifford-Hill promptly thereafter noticed its appeal before the U.S. Court of Appeals, where the case is now pending.

^{11/} The full text of the FTC's "Procedures for Implementation of the National Environmental Policy Act" appears in Appendix B.

QUESTIONS

4:

1. Whether, in CEQ's view, the environmental impact statement process should apply to adjudicatory proceedings commenced by the FTC to enforce the Clayton Act and the Federal Trade Commission Act.
2. Whether, in CEQ's view, an environmental impact statement should be required in connection with the FTC's continuing implementation of its Cement Guidelines.

DISCUSSION

The National Environmental Policy Act authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States be interpreted and administered in accordance with the environmental policies of the Act. 42 U.S.C. § 4332(1) This mandate applies to all activities of Federal agencies. NEPA also establishes, for a much more limited class of Federal actions, a formal environmental analysis requirement.

Section 102(2)(C) of the Act requires agencies to develop a detailed forecast of the environmental effects of a proposal -- an environmental impact statement -- whenever that proposal constitutes a major Federal action significantly affecting the environment. 42 U.S.C. § 4432(2).

The process surrounding the preparation of environmental impact statements usually involves four major stages. First, a Federal agency must decide whether a particular proposed action requires the preparation of an impact statement. If no impact statement is required, the Federal agency can proceed directly with its proposal, although if the decision not to prepare a statement is questionable, the agency must document the basis for its determination before going further. This documentation is frequently termed a "negative declaration."^{12/} Second, if a statement is required, the agency must prepare a draft statement. This requires forecasting in detail the environmental effects of both the

^{12/} See, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973).

proposed action and reasonable alternatives to the action. Third, the Federal agency must circulate its draft statement for comment and prepare a final statement. Circulation of the draft means sending the draft to all groups directly interested in the proposed action -- other Federal agencies, State and local agencies, CEQ, private industry, and the public. The Federal agency must allow these groups a reasonable time to comment on the draft. This is usually considered to be at least 45 days. The agency must then prepare the final statement by revising the draft to reflect the agency's response to all the major comments received. Finally, in the fourth stage, the agency may proceed with its normal review process to reach a decision on the proposed action in light of the analysis set forth in the final impact statement, and other factors relevant to the agency's decision-making.

The major issue presented here is whether the FTC's adjudicatory proceedings to enforce the anti-trust prohibitions of the Clayton Act and the Federal Trade Commission Act are

subject to this formal impact statement process. The FTC's procedures implementing NEPA essentially exempt such decisions from § 102(2)(C). According to § 1.32(d) of its procedures:

"Nothing in this procedure shall be construed as stating or implying that the requirements of section 102(2)(C) of the National Environmental Policy Act apply to: Any investigation made by the Commission for law enforcement purposes; any process or order issued by the Commission in connection with any type of investigation; any agreement of voluntary compliance or consent decree entered into by the Commission, or any adjudicatory proceedings commenced by the Commission."

Gifford-Hill has argued that no valid basis exists for this exemption.

NEPA itself contains no express exemptions from its impact statement requirements for categories of agency activity. However, the legislative history surrounding the enactment of NEPA, while sparse, suggests that Congress visualized requiring the environmental impact statement process primarily (although not exclusively) in connection with proposals which relate either to discrete projects or

major agency programs. According to the Senate Report^{13/} which accompanied S. 1075, the Senate bill that first raised the requirement for an environmental analysis and the bill that ultimately led to § 102(2)(C) of NEPA:

"Each agency which proposes any major actions, such as project proposals for new legislation, regulations, policy statements, or expansion or revision of on-going programs, shall make a determination as to whether the proposal would have a significant effect on the quality of the human environment."^{13/}

Congress did not dwell much further on the scope of its requirement for an environmental analysis. Apart from this statement, the legislative history is barren of additional discussion of the issue, except in the Conference Report,^{14/} where the Conferees briefly explained their addition of the words "to the fullest extent possible" to the requirement that certain actions be accompanied by impact statements. According to the Conferees, the inclusion of the modifying phrase was not meant to provide a loophole, but rather was

^{13/} S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969).

^{14/} H.R. Rep. No. 91-465, 91st Cong., 1st Sess. (1969).

meant to reflect that an agency must comply with the requirements of section 102(2) unless existing law "expressly prohibits or makes full compliance with one of the directives impossible."

This recognition of possible situations where the impact statement process is not appropriate has led to attempts by a number of agencies to have all or parts of their programs exempted. Almost all of these attempts have been struck down when subjected to judicial review. See, e.g., Harlem Valley Transportation Ass'n v. Stafford, 500 F.2d 328 (2nd Cir. 1974), and Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). However, courts have stated, on a few occasions, that some federal actions are not within the intended scope of § 102(2)(C) of NEPA.

The first such recognition arose in Cohen v. Price Commission, 337 F. Supp. 1236 (S.D. N.Y. 1972). There, the court concluded, in denying a motion for a preliminary injunction, that there was substantial doubt as to whether Congress intended the impact statement process to apply to decisions by the Price Commission under the Economic

stabilization Act. The court noted that Congress expected the Commission to act with promptness and dispatch, and that this appeared to be incompatible with the more deliberative decision-making by the environmental impact statement process.

"It is doubtful, to say the least, that Congress intended [the Price Commission], which perforce, if it is to function effectively must act expeditiously, be required before authorizing an increase in the price of a loaf of bread, a bottle of milk, a can of beer, a gallon of gasoline or a ton of steel, not only to make a determination of the environmental impact of its proposed action, but also to consult with and to obtain the views of other federal agencies with respect thereto and, pending receipt of such views, withhold determination for at least ninety days, with the consequent delay. Such procedural restrictions would seemingly be at odds with Congress' announced purpose that the successful implementation of the Stabilization Act required 'prompt judgements and actions by the executive branch . . . ' and its recognition that "[t]he President is in a position to implement promptly and effectively the [Stabilization] program . . . ' and may well render impossible the achievement of that program." [footnotes omitted] 337 F. Supp. at 1241

In Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), the court looked at whether EPA's promulgation of new source performance standards under § 111 of the Clean Air Act was subject to the impact statement process. The court noted that "[t]here is no express exemption in the language of the Act or Committee Reports" 486 F.2d at 381, and that in looking at the policies underlying NEPA, "we encounter competing considerations" 486 F.2d at 383. The court concluded, however, that "a narrow exemption from NEPA" 486 F.2d at 387 was warranted. The court looked at the rule-making process under which EPA is required to propose a standard and thereafter solicit comments on it from outside groups, the requirement that EPA accompany a proposed standard with a statement of reasons fuller than the minimum rule-making requirement of the Administrative Procedure Act, and the availability of the courts to scrutinize the results reached by EPA. According to the court:

"Although [this] rule-making process may not import the complete advantages of the structured determinations of NEPA into the decision-making of EPA, it does, in our view strike a workable balance between some of the advantages and disadvantages of full application of NEPA."
486 F.2d at 386

In accord with this decision, a number of other EPA actions have similarly been excluded from the impact statement process. See, for example, Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247 (D.C. Cir. 1972); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Getty Oil v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972), cert. denied, 409 U.S. 1127 (1973).

The third of the three agencies for which a limited exclusion has so far been recognized is the Federal Energy Office (FEO). In Gulf Oil Corporation v. Simon, 373 F. Supp. 1102 (D.C. D.C. 1974), the court adopted the reasoning in Cohen v. Price Commission, supra, and concluded that no impact statement was required in connection with FEO's promulgation

of mandatory oil allocation regulations under the Emergency Petroleum Allocation Act of 1973. The court looked at the requirement that FEO promulgate regulations within 15 days after the emergency legislation's enactment, and concluded that:

"In light of the Congressional demand that immediate measures be adopted the Court feels that the inherent tension between NEPA and the Allocation Act, at least as it involves the specific regulations here in issue, must be resolved on balance with a finding that the FEO was not required to draft an environmental impact statement." 337 F. Supp. at 1105

These cases set forth the basic framework which the courts have so far developed in reviewing proposed exclusions from the full requirements of § 102(2)(C). Under these cases, a reviewing court should look at the procedural requirements underlying both § 102(2)(C) of NEPA and the specific agency activity at issue. The court should also look at the basic policies underlying § 102(2)(C) and the legislation authorizing the particular agency action in question. An exclusion should not be allowed unless a fundamental conflict exists and "a workable balance between some of the advantages and disadvantages of

full application of NEPA" has been struck. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 386 (D.C. Cir. 1973).

Applying this perspective to adjudicatory proceedings commenced by the FTC to enforce Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, we are of the view that such actions are not ones for which impact statements should be required.^{15/}

We are advised that enforcement of the Clayton Act and the Federal Trade Commission Act typically involves a series of

^{15/} We are, accordingly, in agreement with the conclusion of the U.S. District Court for the District of Columbia on whether an impact statement is required in connection with the instant case. According to the District Court "the FTC decision to initiate antitrust enforcement proceedings against GFH is not within the range of situations to which NEPA was intended to apply" Gifford-Hill & Company, Inc. v. Federal Trade Commission, et al., Civil Action 74-1265 (D. D.C.), Memorandum Opinion dated November 13, 1974, at page 17. Apart from the District Court's opinion, only one other court has so far had occasion to speak on the issue of whether impact statements should be required in connection with enforcement proceedings. In Getty Oil Company v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972), the Court of Appeals for the Third Circuit stated, as dictum, in connection with Getty Oil's attack on EPA's issuance of a compliance order under the Clean Air Act, that "[t]o require an impact statement at the enforcement stage would do substantial harm to the congressional purpose of obtaining expeditious compliance with primary and secondary air standards."

steps. It begins with a decision by FTC staff on whether a specific factual situation warrants investigation. If the staff concludes that it does, an investigation is carried out; and the results are weighed in light of both the applicable law and other policy considerations relevant to deciding whether to prosecute. These considerations presumably include the resources necessary to mount an action, the type of remedy which might be secured, the precedential value of the case, and others. If a decision is made to prosecute, a draft complaint is prepared, which is then presented to the Commission for its approval. After approval, negotiations begin on a possible consent order. If the negotiations are unsuccessful, a formal complaint is filed, which in turn initiates a formal adjudicatory proceeding before an administrative law judge. After the conclusion of the adjudicatory proceeding, the administrative law judge renders his decision, which becomes final unless modified by the Commission. Thereafter, an appeal with the courts may be filed.

Gifford-Hill has argued that an impact statement should be prepared in connection with this series of steps, and in particular prior to a decision by the FTC on whether to commence an adjudicatory proceeding. This necessitates, however, the acceptance of either, or both, of two possible rationales. First, an impact statement should be required to determine whether a statutory prohibition should be condoned, or allowed to continue, because of the potential environmental harm from remedying the violation. Or second, an impact statement should be required because alternative solutions exist to remedy the alleged violation, and the choice among these alternative solutions should depend, at least in part, on a detailed study of their environmental implications.

We find it difficult to accept the first rationale as a basis for requiring an impact statement. While prosecutorial discretion may depend on a large number of factors, it is unreasonable in our view to subject the exercise of it to a formal and lengthy environmental analysis process. We think it particularly inappropriate

when that process must be carried out, as would be required by NEPA, in consultation with numerous federal, state, and local agencies,^{16/} and subject to full public review.^{17/}

Such an approach, at the outset, would substantially delay enforcement of the anti-trust laws, and consume scarce and limited resources. These elements are not dispositive, since to some extent the initial application of § 102(2) (C) of NEPA to an agency's program frequently produces some delay and requires some reallocation of manpower. However, these disadvantages can become particularly important in certain law enforcement situations, where the government must be able to negotiate and to act quickly.

Application of the environmental impact statement process to the exercise of prosecutorial discretion would also create a heavy imbalance in the elements developed for deciding

^{16/} Section 102(2) (C) of NEPA requires that the views of federal, state, and local agencies be solicited and accompany the proposed action through the sponsoring agency's review processes.

^{17/} Section 102(2) (C) of NEPA requires that all impact statements be made available to the public pursuant to 5 U.S.C. § 552.

whether to go forward. The FTC would have before it a complex of factors, only one of which had gone through a lengthy public review process. While § 102(2)(C) of NEPA was intended to correct an imbalance in agency decision-making resulting from inadequate consideration of the environment, application of § 102(2)(C) to decisions on whether to enforce the anti-trust laws appears to us to perpetuate this imbalance, albeit in the opposite direction. We find it difficult to imagine a proposed divestiture case under the Clayton Act or the Federal Trade Commission Act where the likely environmental consequences would be so significant to justify subjecting the decision on whether to prosecute to the requirements of the impact statement process.

Application of the impact statement process to the exercise of prosecutorial discretion would also, in our view, frequently invite largely unproductive litigation. In many, if not most, cases, the proposed defendant would find it in his best interest to litigate whether an impact statement should be prepared, and if one was prepared, the

adequacy of the agency's environmental analysis. While the application of § 102(2)(C) of NEPA to an agency's program always raises the possibility of litigation by an adversely affected party, such application to decisions on whether to prosecute alleged violations of the anti-trust laws would create an incentive to sue by the party accused of violating the law. Moreover, this incentive to sue would lie with the party able to structure, at least in a divestiture case, the environmental consequences that might result from the divestiture.

Thus, application of the impact statement process to the exercise of prosecutorial discretion would create, in our view, substantial impediments to enforcing the anti-trust laws; and would appear to go a long way towards nullifying that discretion.^{18/} We find it difficult to reach the conclusion that such a result was intended without more explicit direction from Congress.

^{18/} We also question what the role of the courts might be, should NEPA be construed as applying to this type of agency action. The law is well established that the exercise of prosecutorial discretion rests solely with the Executive, and is not subject to judicial review. See, for example, Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied, 85 S. Ct. 1767 (1965).

The second possible rationale for applying the impact statement process to the FTC's adjudicatory proceedings is that alternatives may exist to remedy an alleged violation of the anti-trust laws, and the choice among these alternatives should depend, at least in part, on a formal study of their environmental implications. In our view, this argument is "more simplistic than simple" Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied 42 U.S.L.W. 3653 (1974), and in light of the disadvantages that would ensue, we find it insufficient basis for requiring the application of § 102(2)(C). The delays and consumption of resources noted above would also apply here; and an incentive for unproductive litigation would similarly be created.

Moreover, and perhaps of greater significance, many of the objectives underlying the impact statement process will frequently be achieved in a law enforcement adjudicatory proceeding, even without a formal requirement for an impact statement. After a violation of the anti-trust laws has been demonstrated, the focus in an adjudicatory proceeding

shifts to whether specific remedial action, in addition to an order prohibiting the unlawful act, is appropriate.

If such additional remedial action is appropriate, it will typically involve, in cases under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, ordering the divestiture of one or more companies.

While questions may be raised about the appropriateness of alternative divestiture orders, in most cases these questions will not go to their environmental consequences, since in most cases these consequences will not be significant.

In those few cases where the environmental consequences might be significant, an incentive to prepare an environmental analysis and present it in the proceeding will also usually be created. To the extent the parties disagree about a proposed remedy, and its environmental consequences may be significant, the parties are likely to find it in their best interests to prepare a detailed environmental analysis. Essentially the same situation exists here as exists whenever the parties to a case disagree over a major issue. They submit their

evidence, and bring in outside groups to present their expert views, in order to illuminate the issue and, hopefully, persuade the administrative law judge.^{19/}

Accordingly, even without a formal requirement for an impact statement, many of the benefits that might result from such a requirement are likely to be available. Moreover, these benefits would be available, for the rare case where they might be appropriate, without at the same time subjecting every proposal for remedial action to a formal threshold determination on whether to do an impact statement, and the consequent problems that would be created, as discussed earlier. While the adversarial nature of the FTC's enforcement proceedings may not completely substitute for the inquiry that would otherwise occur under § 102(2)(C), it does, in our view, yield a "workable balance between some of the advantages and disadvantages of full application of NEPA." Portland Cement

^{19/} The FTC might even decide that voluntary preparation of an impact statement would be a desirable course of action to follow.

Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3653 (1974).

Our opinion as to the validity of Section 1.82(d) of the FTC's regulations is strongly reinforced when we look at the application of the exemption to the instant case. Here, Gifford-Hill has based virtually its entire argument on the abstract question of whether the FTC's adjudicatory proceedings are subject to the impact statement process. One must search the large number of pleadings which Gifford-Hill has filed to find any reference to significant environmental effects which might result from FTC action in the case at hand.

The strongest statement we can find appears in Gifford-Hill's brief before the Court of Appeals seeking review of the District Court's decision. There, Gifford-Hill argues that "the Commission's proposed action with respect to the Becker acquisition could have a significant effect on the environment by proliferating the strip-mining operations that are conducted to extract sand and gravel from the earth."20/

20/ Brief for Appellant at 7.

Gifford-Hill seems to avoid assiduously any statement that it will establish a new strip mining operation if it is required to divest itself of Becker, or even show that that course of action would be a likely one for it to follow as a result of a divestiture order. Moreover, no indication is given of where a hypothetical new facility might be established, even though Gifford-Hill fully controls such a decision, at least in the first instance. To require an impact statement, or even a formal record inquiring into the need for an impact statement, based on such a tenuous allegation, would appear to reflect a serious misallocation of the Commission's efforts.

In summary, we are of the view that § 102(2)(C) of NEPA should not apply to adjudicatory proceedings of the FTC to enforce Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. We reach this conclusion, even though the remedy that might be requested by the FTC could at least hypothetically lead, through a chain of events, to significant environmental consequences. Accordingly,

we find no merit in the argument that a "generic"^{4e} negative declaration should have been prepared by the FTC prior to its promulgation of § 1.82(d) of its regulations.

While we are also of the opinion that no impact statement is required in connection with the Commission's implementation of its enforcement policies for the cement industry, our reasoning is necessarily different. Section 1500.5(a)(3) of the CEQ Guidelines states that actions that may be subject to § 102(2)(C) of NEPA include "the making, modification, or establishment of regulations, rules, procedures, and policy." Section 1.82(a) of the FTC's procedures states that "[n]o Commission rule or guide which constitutes a major action significantly affecting the environment shall be promulgated unless an environmental statement has been prepared for consideration in the decision-making." Potentially, then, the Commission's enforcement policies for the cement industry are subject to the need for an impact statement. This is so, even though the policies were issued in 1967 -- well prior to the passage of NEPA. The grace period for applying NEPA to the administration of an agency program initiated prior to 1970 has clearly lapsed.

While the Cement Guidelines are thus potentially subject to § 102(2)(C), a close inspection of them indicates that specific environmental impacts cannot be attributed to their continued implementation. The Guidelines establish a policy of opposing the acquisition of key aggregate suppliers in certain cases. Clearly, this will not substantially affect the location or the volume of aggregates production, although it may tend to increase the number of aggregate suppliers. An increased number of aggregate suppliers could result in an increased number of sand and gravel strip mines. However, one cannot determine in advance where those additional mines might be. Thus, one cannot attribute specific environmental consequences to the continued implementation of the Cement Guidelines.

The pleadings submitted by Gifford-Hill make an attempt to circumvent this problem by analogizing the continuing implementation of the Guidelines to the AEC's Liquid Metal Fast Breeder Reactor program. According to the brief of Gifford-Hill:

"It is immaterial that the Commission cannot now predict with certainty that further implementation of the Cement Guidelines or a particular proposed adjudicatory proceeding will, in fact, cause increased aggregates mining or the amount of increase. An agency cannot avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting . . . It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of the proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation are thus implicit in NEPA. . . ." Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

This analogy is invalid, in our view, for at least two reasons. First, the potential environmental impact of the LMFBR program is so great as to raise questions about whether the program should proceed at all. The program creates the possibility of catastrophic environmental consequences. This situation creates a much greater burden on an agency to deal with remote possibilities than in the instant case.

21/ Appellant's memorandum in support of its motion before the District Court for a preliminary injunction, footnote at page 22.

Here, the potential environmental effects are not great, and are clearly not dispositive of whether the FTC should generally proceed against vertical acquisitions in the cement industry. Accordingly, the need for environmental forecasting in the two cases is clearly very different.

Secondly, the environmental effects of concern in the LMFBR case are not exclusively site-specific. They include such general questions as methods for collection and storage or disposal of long-term highly radioactive wastes. A forecasting of the environmental impacts of the LMFBR program does not therefore require a determination of the specific location of each new future reactor site. In contrast, the environmental effects of a new sand and gravel mine are almost wholly site-specific. Accordingly, the utility in attempting an environmental forecasting in the two cases is also clearly very different.

In conclusion, the Council does not find merit in the arguments put forth urging that § 1.82(d) of the FTC's

regulations be declared inconsistent with the provisions of NEPA, or that an impact statement be required in connection with the FTC's continuing implementation of its Cement Guidelines. In the Council's view, the FTC's actions in the instant case are consistent with the requirements of the National Environmental Policy Act.

Enforcement Policies of the FTC With Respect to Vertical Mergers in the Cement Industry

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FTC Policy

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[§ 4515] FTC Policy Statements

The following antimerger enforcement policies with respect to mergers in particular industries have been announced by the FTC.

In its policy announcements, the Commission has established standards for given industries by which it will measure the need for immediate attention and consideration. In the food distribution industries, for example, any merger which results in combined annual food store sales in excess of \$50 million annually raises "sufficient questions regarding . . . legal status to warrant attention and consideration by the Commission," while in the cement industry, issuance of a complaint would be merited if a portland cement company acquired any ready-mixed concrete company regularly purchasing 50,000 barrels of cement or more annually. Grocery product (product extension) mergers will be looked into on the basis of the size of the resulting company, the acquirer's advertising practices and expenditures, and both firms' market positions.

Some of these special FTC policies require that advance notice be given by firms proposing mergers or acquisitions. In the cement industry, all portland companies planning to acquire any ready-mixed companies must give notice; in the food distribution industry, notice is not required unless annual sales after the merger would exceed \$100 million. Neither product extension mergers involving grocery product manufacturers nor textile mill industry mergers require advance notice by virtue of the policy statement covering them. Of course, the general corporate merger reporting requirement (§ 4545) should be considered.

[§ 4520] Cement Industry—Vertical Mergers

Commission Enforcement Policy with Respect to Vertical Mergers in the Cement Industry

Vertical mergers and acquisitions are today the most significant, critical and important problem faced by the cement and ready-mixed concrete industries. Beginning in the late nineteen-fifties a trend of acquisitions of leading ready-mixed concrete producers by cement manufacturers began which now threatens to transform the structures of both industries. This vertical merger movement is of vital importance to the public, and to each of the industries involved. Cement and concrete are basic building materials essential to the nation's economy.

The Commission early became concerned with vertical mergers in the cement industry in the course of carrying out its statutory duties in the enforcement of the antitrust laws. Complaints were issued at the outset initiating a series of adjudicative cases. The trend of acquisitions, however, continued. By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies, while several large ready-mixed companies had entered into the manufacture of cement. Many cement companies had indicated that while

they were opposed to this development, they might be forced in the future to acquire major customers to protect their outlets from further foreclosure. Various segments of the industry requested the Commission to clarify, as soon as possible, the legal status of such mergers. The Commission, therefore, determined to consider the problem on an industry-wide basis to determine whether its current approach to vertical mergers in these industries was correct and effective, or whether it should be supplemented. An industry-wide investigation was commenced, and on April 26, 1966, a Staff Economic Report on "Mergers and Vertical Integration in the Cement Industry" was published. Thereafter, Public Hearings on the problem were held in July 1966, and oral presentations and written statements from the industry were received.

The Federal Trade Commission has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, can have substantial adverse effects on competition in the particular market areas where they occur. This conclusion of the Commission

is based upon prior cases involving such mergers and acquisitions, its own experience in merger policy enforcement, the industry-wide investigation of the problem which culminated in the published report of the staff on "Mergers and Vertical Integration in the Cement Industry," and upon the "Public Hearings" of the Commission held in July 1966.

Based on the information now available to the Commission it appears that the recent trend of vertical acquisitions has involved, almost invariably, leading high volume ready-mixed concrete producers located in major urban areas. Because urban areas contain concentrations of people and industry, they account for the most intense day-to-day construction activity and consequent cement demand, and thus constitute the choice high-volume centers for cement sales. Cement companies therefore concentrate their sales effort upon the urban areas. In recent years, for example, the great majority of over 230 newly constructed cement distribution terminals have been located so as to serve particular metropolitan centers. Distinguishable competitive features usually characterize different urban areas. Different prices generally prevail from one to another, and each is marked by unique supply and demand characteristics. In summary, metropolitan centers are focal points of cement demand and are regarded by cement companies as key marketing areas. It is within these centers that the effects on competition resulting from vertical acquisitions tend to be most keenly felt.

Such urban markets, within which vertical mergers and acquisitions take place, are often highly concentrated on both the supply and demand sides. Cement is a heavy, bulky product economically impractical to ship very far except by water. For this reason, almost all cement is sold and used comparatively near the site of production. Cement production is decentralized and is based upon a network of geographically scattered plants which ship directly, or through terminals, to consumers in adjacent markets. Most urban markets therefore are served by comparatively few producers. Out of the fifty largest metropolitan markets in the United States, 19 had five or fewer cement companies soliciting sales, and an additional 19 had only five to ten suppliers. Illustrative are: Seattle—3; Miami—6; Tampa—6; San Francisco—4; Portland (Oreg.)—4; Denver—2; Detroit—9; Jacksonville—7. A survey conducted of 22 "top" cement markets and 11 "secondary" markets by one of the industry participants in the

public hearings showed 25 had only three to eight suppliers. Notwithstanding the possibility of some technical improvements in bulk rail transportation of cement, it nevertheless appears that today the geographic area practicable for any given cement producing plant to service is a limited one. From the information known to us to date, it seems improbable that any fundamental change in the relative concentration of available cement suppliers servicing particular metropolitan markets, as well as larger regions, will occur in the foreseeable future.

Similarly, although there are well over 4,000 ready-mixed concrete producers in the United States, the major needs of most urban areas are supplied by a few sizeable ready-mix firms. Concrete is a highly perishable commodity of great bulk and weight and, even more crucially, in the case of cement, high transportation costs in comparison with the price limit the area serviceable from a particular plant. Concrete is normally not transported more than five to ten miles from the production site to the construction job of the purchaser. Any given metropolitan area would therefore appear to be a definitive market for concrete production and sale, and it is not likely that there are any outside suppliers actually or potentially available. In most urban centers, the ready-mixed concrete industry is quite concentrated. For example, the four largest ready-mixed concrete companies doing business in San Francisco, Boston, Cleveland, Milwaukee, New York, Buffalo, Philadelphia, Baltimore, Pittsburgh, Kansas City, Memphis, Phoenix, Norfolk, Portland (Ore.), Seattle, Jacksonville, and Richmond made approximately 50 percent or more of the concrete sales in those cities.

The ready-mixed concrete industry is relatively new, having its origins subsequent to World War I and its period of rapid development after World War II. Nevertheless it has already greatly surpassed the cement industry in the total dollar value of shipments. In 1964, the value of all cement produced was \$1,150,000,000 whereas the total value of sales of ready-mixed concrete was larger by almost \$800,000,000 amounting to \$1,987,000,000. Out of a total 1964 cement production in the United States of 362,633,000 barrels, ready-mixed concrete companies purchased about 60 percent. The importance of the ready-mixed concrete firms as cement consumers is even greater in metropolitan centers where there is reason to believe that they account for 70 percent or more of cement purchases.

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In any given metropolitan market ready-mixed concrete producers are therefore dominant cement consumers and constitute the crucial link in cement distribution and use. When one or more major ready-mixed concrete firms are tied through ownership to particular cement suppliers, the resulting foreclosure not only may be significant in the short run, but may impose heavy long-run burdens on the disadvantaged cement suppliers who continue selling in markets affected by integration. Acquisitions of leading cement consumers in markets containing comparatively few volume buyers may have the effect of substantially disrupting the competitive situation at the cement level, and, in fact, may set off a "chain" reaction of acquisitions.

Unintegrated ready-mixed concrete producers furthermore may be at a disadvantage in competing with rivals who are integrated cement and concrete manufacturers. This is true not only because of disparities in size and access to capital, and the advantages inherent in product and market diversification, but also because of the potential "price squeeze" latent in competition with integrated companies.

The more extensive vertical integration becomes in the cement and concrete industries, the higher tends to be the level of entry barriers in individual metropolitan markets and in larger geographic regions. This can result from a number of causes. Higher capital requirements are necessitated by entry into the production of cement and ready-mixed concrete on an integrated basis. The capital requirements for entry on an integrated basis appear to be double the cost of entry into the production of cement only. But the need for far more capital is not the only problem. Industry executives at the public hearings were unanimous in stating the difficulty of penetrating the ready-mixed concrete industry on a significant scale in markets containing long established ready-mixed concrete producers. New entrants in ready-mixed concrete in integrated markets, of course, may face the additional deterring effect of competition with very large, diversified and integrated rivals.

Criteria Used to Identify Mergers Which Warrant Immediate Action

The Commission's characterization of particular organizational developments in the cement and ready-mixed concrete industries and their probable competitive consequences represent the Commission's current knowledge of these matters as revealed by its own

experience in various litigated cases, as well as an industry-wide investigation accomplished through survey, staff analysis and public hearings. In view of its extensive activity in the application of Section 7 to forestall anticompetitive mergers, together with its understanding of prospective developments in cement manufacture and distribution, this Commission wishes to make abundantly clear insofar as possible, its future enforcement policy with regard to vertical mergers in the cement and ready-mixed concrete industries. In so doing it is expected that needless litigation may be forestalled. At the same time however it should be noted that the issues in any proceeding instituted by the Commission will be decided on the merits of that case.

I. The Commission has determined as a matter of general enforcement policy to use all the legal weapons at its disposal to proceed against and order the divestiture of those vertical acquisitions which it believes may unlawfully lessen competition in any market. Specifically, the Commission intends to investigate expeditiously every future acquisition by a cement producer of any substantial ready-mixed concrete firm in any market to which such acquiring producer is an actual or potential supplier. Whenever such an investigation reveals the market circumstances described below, the Commission shall issue a complaint challenging the acquisition under Section 7 of the Clayton Act, unless unusual circumstances in a particular case dictate the contrary.

II. In general, the acquisition of any ready-mixed concrete firm ranking among the leading four nonintegrated ready-mixed producers in any metropolitan market, or the acquisition of any ready-mixed concrete company, or other cement consumer, which regularly purchases 50,000 barrels of cement or more annually, will be considered to constitute a substantial acquisition.

III. The determination of the Commission to challenge the acquisition by a cement supplier selling in a market of any of the top four ready-mixed concrete firms therein, or of any cement consumer in such market who regularly buys 50,000 or more barrels annually, does not mean that the acquisition of smaller firms will necessarily be considered lawful or go unchallenged by the Commission. The acquisition of several smaller ready-mixed concrete producers whose cumulative purchases of cement annually approximate those of a ready-mixed concrete company of the foregoing specified size or the acquisition of a cement user which gives to a cement producer that is

already integrated forward into the relevant market a substantial position of the foregoing specified size may have at least as severe anticompetitive effects as the acquisition of a single larger firm.

IV. The Commission's intention to challenge all substantial vertical acquisitions does not exempt markets where integration has already occurred. A partially integrated market can still be attractive to a new cement producer who is looking for multiple markets to serve from a large efficient plant, or to attract a manufacturer on the edge of a market who wishes to expand his geographic area of sales. Likewise markets which have witnessed significant vertical integration may still offer inducement to new ready-mixed concrete competitors to enter. The Commission therefore intends to act to preserve the open portions of partially integrated markets to the fullest extent possible.

V. In promulgating a statement of general enforcement policy with respect to integration through mergers and acquisitions, the Commission recognizes that there are other means by which it is possible, to some extent at least, for cement suppliers to exert pressure on consumers of cement. In some cement markets, the acquisition of key aggregates producers can constitute a way by which ready-mixed concrete companies, and other cement consumers, can be influenced in making their cement purchases and competition can be substantially lessened thereby. The anticompetitive effects usually associated with the acquisition of ready-mixed concrete producers can be brought about in such areas indirectly by the acquisition of aggregates concern. The Commission therefore will oppose the acquisition of key aggregates suppliers in a market wherever there is reason to believe that such

acquisitions may confer upon the acquiring cement company any significant ability to exert anticompetitive "leverage" on cement consumers affecting their freedom to choose cement suppliers.

VI. To carry out this program expeditiously and uniformly, the Commission must know of prospective acquisitions and mergers in advance of their consummation. Accordingly, all portland cement companies will be required to notify the Commission at least 60 days prior to the consummation of any merger or acquisition involving any ready-mixed concrete producer. The Commission will notify all portland cement companies each year, so long as this enforcement policy is in effect, and will require each to file special reports with the Commission under the authority provided by Section 6 of the Federal Trade Commission Act.

This action by the Commission should not be interpreted to mean that cement firms must request Commission approval prior to the consummation of any merger or acquisition. However, the Commission shall continue to provide advisory opinions, as provided by its Rules of Practice, regarding the legality of particular mergers, and invites those contemplating mergers to avail themselves of this program in any situation where they are uncertain as to the legality of a prospective merger.

Chairman Dixon and Commissioner McIntyre, while approving the enforcement criteria set forth in this statement, did not concur in the action of the Commission in providing for the requirement that special reports be filed with the Commission 60 days in advance of any merger under the authority of Section 6 of the Federal Trade Commission Act. (Released January 17, 1967.)

FTC Procedures for Implementation of
the National Environmental Policy Act
16 C.F.R. §§ 1.81-1.85

Subpart I—Procedures for Implemen-
tation of the National Environ-
mental Policy Act of 1969

Authority: The provisions of this Subpart I issued under sec. 102(2)(C), 83 Stat. 853; 42 U.S.C. 4332; E.O. 11514; CEQ Guidelines.

Source: The provisions of this Subpart I appear at 36 F.R. 22314, Dec. 1, 1971, unless otherwise noted.

§ 1.81 Authority.

(a) Section 102(2)(C) of the National Environmental Policy Act of 1969, Public Law 91-190, which is implemented by Executive Order 11514, and Guidelines issued by the Council on Environmental Quality (36 F.R. 4724, April 23, 1971) (hereinafter referred to as "CEQ Guidelines") require all Federal agencies including the Federal Trade Commission to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official on:

- (1) The environmental impact of the proposed action;
- (2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (3) Alternatives to the proposed action;
- (4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(b) The above-cited authority further prescribes that, prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal or State agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies shall be made available to appropriate officials and the public, and shall accompany the proposal through the existing agency processes.

§ 1.82 Declaration of policy.

(a) No Commission rule or guide which constitutes a major action significantly affecting the environment shall be promulgated unless an environmental

statement has been prepared for consideration in the decisionmaking.

(b) No Commission legislative proposal or Commission legislative report on a legislative proposal in an area in which the Commission has statutory responsibility concerning matters which significantly affect the environment will be submitted without an accompanying environment impact statement.

(c) A statement will not accompany such action where the Commission finds that expeditious action is in the public interest. In such instance, the Commission will consult with the CEQ as provided in section 10(d) of the CEQ Guidelines and shall develop a statement promptly after the action.

(d) Nothing in this procedure shall be construed as stating or implying that the requirements of section 102(2)(C) of the National Environmental Policy Act apply to: Any investigation made by the Commission for law enforcement purposes; any process or order issued by the Commission in connection with any type of investigation; any agreement of voluntary compliance or consent decree entered into by the Commission; or any adjudicatory proceedings commenced by the Commission.

§ 1.83 Implementing procedures.

(a) *Rules and guides.* (1) The Directors of the Bureau of Consumer Protection and Competition shall establish procedures for their bureaus to assure that all proposed rules and guides being developed within their respective areas of responsibility are reviewed to assess the need for statements on the impact on the environment, and that, where a need is found, a statement is developed.

(2) All proposed rules and guides shall be reviewed at the earliest opportunity by the appropriate heads of the initiating staff units to determine whether the rule or guide might relate to, or involve, environmental considerations. Staff recommendations to the Commission proposing the initiation of a proceeding to determine whether a rule or guide should be promulgated shall include an assessment of the anticipated environmental impact, if any. The criteria prescribed in subsections 5 (b) and (c) of the CEQ Guidelines shall be used in determining if any action will have a significant effect on the environment.

(3) The Commission shall make the final determination whether the pro-

posed Commission proceeding may be a major action significantly affecting the quality of human environment. Upon the determination by the Commission that a proposed rule or guide may have a significant effect on the quality of human environment, the staff will prepare a draft statement which shall become part of the public record as provided hereinafter.

(4) Concurrent with publication in the FEDERAL REGISTER of a proposed rule or guide wherein the potential for a significant effect on the environment has been identified, draft statements will accompany the proposed rule or guide in the FEDERAL REGISTER and will be circulated by the Commission to appropriate officials and agencies, within and outside the Federal Government, with jurisdiction by law or special expertise with respect to any environmental impact involved. Whenever appropriate, the clearinghouse mechanism No. A-95 (July 24, 1969) shall be utilized.

(5) Thirty days will be allowed for comment on draft statements of environmental impact. If no statements are filed within this period, it will be presumed that, unless an agency consulted requests an extension of time, the agencies consulted have no comment. To the extent possible, 30 days will be allowed for comment after the text of the final statement on proposed action affecting the environment has been made available. In no event will a final rule or guide be promulgated prior to 90 days after circulation of the draft statement. When emergency circumstances make such periods impossible, the Commission will consult with the Council as provided in section 10(d) of the CEQ Guidelines.

(6) Draft statements of environmental impact and final statements on proposed action affecting the environment, along with comments received on draft statements, will be made available to the President by transmission to the Council on Environmental Quality, as provided in section 10(b) of the CEQ Guidelines.

(7) The draft statements, comments, and views obtained with respect to them, and final environmental impact statements will be made available to the public in accordance with the Commission's procedures and rules of practice at the Office of the Assistant Secretary for Legal and Public Records, Federal Trade Commission, Washington, D.C. 20580. They will also be made available through the

National Technical Information Service of the Department of Commerce, Springfield, Va. 22151. Public comment received before the closing of the record in a proceeding to promulgate a rule or guide will become part of that record.

(b) *Legislation.* (1) The General Council shall establish procedures to assure that legislative proposals and legislative reports on matters for which the Commission has statutory responsibility are reviewed to assess the need for statements on the impact on the environment and that, where a need is found, a statement is developed. Such statements shall be finally approved by the Commission.

(2) The proposed section 102(2)(C) statements and the required comments shall accompany legislative proposals and reports when these are sent to the Office of Management and Budget for clearance. At the same time, copies of this material shall be furnished directly to the Council on Environmental Quality for its information.

(3) After differences with other agencies over the legislative proposal or report have been resolved, the Commission will put the section 102(2)(C) statement in final form (including such comments and views of the appropriate Federal, State, and local agencies as are pertinent). The final statement and comments shall accompany the proposal or report to the Congress as supporting material. Copies of this final material shall be furnished directly to the Council on Environmental Quality.

§ 1.84 Review.

(a) The General Council has been assigned the responsibility for coordinating the Commission's efforts to improve environmental quality and is hereby designated the official responsible for the Commission's statements as specified in subsection 3(a)(3) of the CEQ Guidelines. He shall provide guidance and assistance to operating units in determining when a statement is needed and in preparing the necessary environmental statements. As part of this overall responsibility, he is charged with reviewing environmental statements prepared by the staff to assure that such statements comply with the CEQ Guidelines. In the event he finds that a statement is not adequate, he shall recommend to the Commission that the action not be taken until the proper adjustment is made.

(b) The Commission shall review the staff proposal and the recommendation

of the General Council to finally determine whether the action complies with the National Environmental Policy Act of 1969.

§ 1.85 Effect on prior actions.

With respect to those proceedings already in progress, the Commission recognizes that it will not be possible to comply fully with the procedures here outlined and, in particular, that it will not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings to which these guidelines apply which are already in progress.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOBIL OIL CORPORATION, GULF OIL
CORPORATION, SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs,

-against-

FEDERAL TRADE COMMISSION; and
LEWIS A. ENGMAN, Chairman,
PAUL RAND DIXON, Member,
MARY ELIZABETH HANFORD, Member,
STEPHEN NYE, Member, and MAYO J.
THOMPSON, Member and CHARLES A. TOBIN,
Secretary; as officers of the
FEDERAL TRADE COMMISSION,

Defendants.

OPINION

75 Civ. 2748
(JMC)

CANNELLA, D.J.:

Plaintiffs' motion for summary judgment is
granted. Defendants' motions to dismiss the complaint and,
alternatively, for summary judgment are denied.

On July 18, 1973, the Federal Trade Commission
("FTC" or "Commission") issued a complaint, In the Matter
of Exxon Corp., et al., Docket No. 8934 (hereinafter this
administrative proceeding will be referred to as Exxon),
charging the plaintiffs herein and four other major oil
companies with violations of Section 5 of the Federal Trade

Commission Act, 15 U.S.C. § 45. The respondents in Exxon are charged with combining to monopolize the refining of crude oil into petroleum products, maintaining monopoly power over the refining process, and restraining trade and maintaining a noncompetitive market structure in this industry. The Commission also is challenging certain alleged practices including joint ventures in transport and in onshore and offshore lease bidding. By way of relief, Commission counsel stated that they were seeking substantial divestiture of the pipelines and refinery capacity owned by the Exxon respondents.^{1/} Specifically, the proposed relief includes:

- (1) The divestiture of 40 to 60 percent of respondents' refinery capacity in the relevant market and the establishment of 10 to 13 new firms;
- (2) The divestiture of all crude and produce pipelines which connect directly to the new firms and are owned and operated by the refining department of the parent; and
- (3) The transfer to the new firms of fractional ownership shares in connecting joint venture pipelines.^{2/}

Soon after the commencement of the action, the Exxon respondents moved to require complaint counsel to file an environmental impact statement ("EIS") exploring the

environmental consequences of the proposed relief. In support of their joint motion, the Exxon respondents argued that the requested relief would constitute "major Federal action significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C).^{3/}

On February 5, 1975, the administrative law judge denied the motion to require an EIS as well as a motion for immediate certification to the Commission. In so acting, he placed primary reliance upon an FTC rule^{4/} exempting law enforcement proceedings instituted by the Commission from the requirements of § 102(2)(C). On February 25, 1975, the Exxon respondents' request to file an interlocutory appeal from the denial of their motion was denied by the administrative law judge. They then petitioned for extraordinary review by the Commission, which was denied on April 29, 1975.

On June 6, 1975, five of the nine Exxon respondents brought the instant action seeking to enforce FTC compliance with the requirements of § 102(2)(C) of NEPA. Plaintiffs have moved for summary judgment on their claims that complaint counsel are required by § 102(2)(C) of NEPA to file an EIS and that § 1.82(d) of the FTC's

Rules of Practice is void as being in conflict with NEPA. In response to this motion the defendants have cross-moved for dismissal pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the plaintiffs lack standing, that their suit is premature and that their complaint fails to state a claim upon which relief can be granted and, alternatively, for summary judgment. Based upon the Court's finding that the Commission's institution of the Exxon proceeding constitutes a "major Federal [action] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), the Court concludes that plaintiffs herein are entitled to summary judgment.

STANDING

The threshold issue in this case is whether plaintiffs have standing to challenge the FTC's institution of an enforcement proceeding against them without first having filed an environmental impact statement.

Whether a litigant has standing to seek judicial determination of his claims has been litigated on numerous occasions before the United States Supreme Court. In a recent opinion, the Court stated:

This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. E.g., Barrows v. Jackson, 346 U.S. 249, 255-256 (1953)

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Baker v. Carr, 369 U.S. 186, 204 (1962).

Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

When the litigant claims that he is "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the standing test has been articulated as whether the complainant has suffered "injury in fact" to an interest "arguably within the zone of interests to be protected or regulated" by that statute.^{5/} Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970);^{6/} accord, Evans v. Hills, 537 F.2d 589, 590-92 (2d Cir. 1976) (en banc). But see K. Davis, Administrative Law

of the Seventies § 22.02-11 (1976). Although the injury in fact in Data Processing was economic, the Court recognized that this "interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154; accord, United States v. SCRAP, 412 U.S. 669, 686-87 (1973); Sierra Club v. Morton, 405 U.S. 727, 733-34 (1972).

The interests sought to be protected by NEPA may be gleaned from the statute's declaration of purpose:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . .

42 U.S.C. § 4321. Accordingly, plaintiffs have standing to bring this action only if they have alleged--and can prove--environmental injury in fact.

Such injury was alleged in United States v. SCRAP, supra, wherein environmental organizations sought to enjoin the enforcement of an Interstate Commerce Commission order that would allow railroads to collect a surcharge. They argued, as do the plaintiffs herein, that the agency's

failure to file an EIS rendered its action unlawful. The allegations of the environmental organizations that their members used the natural resources in the Washington metropolitan area for recreation and "that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities," 412 U.S. at 685, were found sufficient to confer standing on the groups to challenge the rate increase.^{7/}

In the instant action, plaintiffs allege that the relief requested by the FTC in the enforcement proceeding would result in unnecessary depletion of our nation's natural resources. As oil companies, dependent upon these resources, plaintiffs would thereby suffer injury in fact. The injury alleged is thus both economic (without the necessary supply of resources, the companies might suffer reduced revenues) and environmental (by virtue of their status as oil companies, plaintiffs have a stake in our nation's environment).

Additionally, plaintiffs allege that the proposed divestiture of a substantial percentage of their refineries and pipelines would have a polluting effect on

the environment. It is claimed, for example, that various aspects of a refinery's operations, including--"the sulfur content of the crude oil refined, the percentage of capacity at which it is operated and the means of transportation used for crude oil and refined product"--directly affect the environment.^{8/} A relationship thus established between the environment and a particular refinery, it would follow that any change in operations inevitably would have an environmental impact.

The FTC also is challenging the number of processing arrangements and exchange agreements among the major oil companies. It is alleged by the plaintiffs that restrictions on these arrangements, which are designed to reduce transportation, would lead to increased fuel consumption and pollution.

The FTC is further objecting to the oil companies' practices concerning joint ventures in lease bidding. The plaintiffs contend that any alteration in these practices, especially with respect to offshore drilling, would affect the environment. In support of this argument, they cite the 1974 Draft Environmental Impact Statement prepared by the Bureau of Land Management of the United States Department of Interior, re: Proposed Increase

in Acreage to be Offered for Oil and Gas Leasing on the Outer Continental Shelf. According to this Report, the production of oil, which entails "accidental loss of debris, discharge of drill cuttings, sand, drilling fluids, the burial of pipelines, and the accidental spillage of oil or other toxic materials," id., vol. 2, at 162, involves environmental consequences to the land, water and living organisms as well as affecting the aesthetic environment.

The above allegations, if proved, would be sufficient to confer standing on the plaintiffs. Because the Commission also has accused the plaintiff companies of diverting investment funds from domestic to foreign crude exploration and production, however, they will not be put to this proof. The Court is persuaded by plaintiffs' argument that an increase in domestic exploration and production "would, by its very terms, change the scope and speed with which domestic reserves are developed and depleted, thereby affecting vital supplies of natural resources,"^{9/} and agrees that "[t]his intention to alter the way in which society's resources are used in and of itself supplies sufficient need for an impact statement."^{10/}

Support for this conclusion may be found in National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

That case involved a challenge to the Secretary of the Interior's decision to terminate contracts for the purchase of helium from the plaintiff companies. The plaintiffs claimed that the Secretary could not terminate these contracts without complying with the impact statement process. Anticipating an objection to their standing to raise NEPA claims, the plaintiffs "alleged that if the helium is not extracted by them from the natural gas before the natural gas is delivered to the consumer, the helium would be vented into the atmosphere and lost when the natural gas was consumed as fuel." Id. at 653. The court found that the companies were motivated not only by their pecuniary interest in the continuation of the contracts, but also shared the public interest in avoiding needless "rapid depletion of the helium resources of the country." Id. at 656. Based upon these findings, the Tenth Circuit affirmed the judgment below enjoining the contracts' termination pending the Secretary's compliance with NEPA.

The depletion of our nation's resources is an injury to the very interest to be protected by NEPA. Like the plaintiffs in National Helium, the instant plaintiffs have shown that they would be among the injured, compare Sierra Club, supra, 405 U.S. at 735-40, and the Court

therefore finds that they have standing to bring this action.

The Government's reliance on two cases in which plaintiffs lacked standing to advance their claims, is misplaced. In *Zlotnick v. Redevelopment Land Agency*, 2 ELR 20235 (D.D.C. 1972), aff'd without opinion, 494 F.2d 1157 (D.C. Cir. 1974), wherein plaintiffs opposed an urban renewal plan, the court found that their interest in enjoining condemnation of their land was financial only. The plaintiffs did not live in the affected area and the land they owned consisted merely of a downtown lot. Noting plaintiffs' continuing efforts towards a financial settlement, the court opined that "they would abandon their environmental concerns in a moment if the price were right." Id. at 20236.

In *Clinton Community Hosp. Corp. v. Southern Md. Medical Center*, 374 F. Supp. 450 (D. Md. 1974), aff'd per curiam, 510 F.2d 1037 (4th Cir.), cert. denied, 422 U.S. 1048 (1975), plaintiff hospital sought to enjoin the construction of a new facility approximately two miles away, claiming that, since aircraft passing over the proposed site would endanger the new facility's patients, an EIS should have been filed before the Department of

Health, Education and Welfare ("HEW") issued a grant of feasibility for the proposed project. The amended complaint emphasized plaintiff's pecuniary interest in securing an injunction: plaintiff's 33-bed hospital would be unable to compete with a new 200-bed hospital nearby. Citing Zlotnick, the court held that this economic injury was not within the zone of interest protected by NEPA. Plaintiff's allegation that the environment in which the proposed hospital was to be situated would adversely affect the new facility's patients also did not render plaintiff a proper party to bring the suit. Firstly, the allegation did not constitute an injury suffered by the plaintiff. Furthermore, the injury suffered by hospital patients due to the hospital's environment may very well be within the zone of interests sought to be protected by an HEW statute regulating noise levels in patient care facilities, but is not even arguably within the zone of interests to be protected by NEPA.

A case procedurally similar to the instant case is Gifford-Hill & Co., Inc. v. FTC, 389 F. Supp. 167 (D.D.C. 1974), aff'd, 523 F.2d 730 (D.C. Cir. 1975). There, the FTC had instituted an adjudicatory proceeding against Gifford-Hill to determine whether the company was

in violation of the antitrust laws. Alleging that the proceedings might lead to a divestiture order with resultant environmental impact, plaintiff filed an action in the district court to have the administrative complaint nullified for failure of the Commission to file an EIS. In deciding that plaintiff lacked standing, the court of appeals found that Gifford-Hill's injury in fact--the cost of making its defense in the administrative proceeding and the risk of an adverse ruling--was not even arguably within the zone of interests to be protected by NEPA.^{11/} Thus, beyond the point of procedural similarity, Gifford-Hill is clearly distinguishable from the case presently before the Court.

Like the plaintiffs in Zlotnick, Clinton Community Hospital and Gifford-Hill, the instant plaintiffs will suffer financially if the FTC's enforcement action is successful. But financial injury in fact, although an insufficient predicate for actions brought pursuant to NEPA, does not automatically preclude a plaintiff from instituting such suits. As was noted with respect to plaintiffs in National Helium Corp. v. Morton, 455 F.2d 650, 654 (10th Cir. 1971), it may be "'passing strange' to see the giants of the oil and gas industry representing the public interest,

but . . . they [are] not per se disqualified to occupy this role "

The plaintiff oil companies are profit-seeking corporations. Their financial concerns, however, do not at all hinder their standing to raise NEPA issues because they "have alleged an injury in fact, namely, damage to the environment in which they work and upon which they depend for their livelihood and continued maintenance of the quality of their lives. This interest is arguably within the zone of interest sought to be protected by this intentionally broad protective statute." *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 374 n.35 (D.D.C. 1974).

REVIEWABILITY

A litigant may have standing to object to certain agency action, yet may be unable to have his claims decided at a particular time because the action or allegedly critical effect thereof is too remote or uncertain. In this regard, the FTC claims that the oil companies are not now entitled to judicial review because (1) they have not exhausted their administrative remedies; (2) there has not been any "final agency action" within the meaning of 5 U.S.C. § 704; and (3) the controversy is not yet ripe.

Exhaustion

The FTC argues that the plaintiffs have not exhausted their administrative remedies because they brought this action before the Commission's enforcement proceeding culminated in a final order.^{12/} Plaintiffs counter that they satisfied the exhaustion requirement when their attempts to appeal the denial of their motion to require the Commission's filing of an EIS were unsuccessful.

It has been observed that

[t]he doctrine [of exhaustion] is grounded upon several considerations: (1) the complaining party may ultimately prevail in the administrative proceeding; (2) fact questions may be presented which require factual determinations more properly addressed to the expertise of an agency than to a federal district court; and (3) resolution of these fact questions by the agency may effectively reduce or eliminate entirely the need for judicial review.

Atlantic Richfield Co. v. FTC, 398 F. Supp. 1, 11 (S.D. Tex. 1975); accord, McKart v. United States, 395 U.S. 185, 193-95 (1969). Consequently, it is necessary to examine the circumstances surrounding the particular agency ruling to determine whether further administrative proceedings might ultimately yield a result in movant's favor or illuminate the issue for subsequent judicial review.

The FTC denied respondents' motion to require complaint counsel to file an EIS specifically because the Commission's own regulations exempt adjudicatory proceedings from the requirements of § 102(2)(C) of NEPA.^{13/} Leave to appeal was denied because the administrative law judge found that § 1.82(d) "clearly controls the instant matter and there is no basis for finding that there is a substantial ground for difference of opinion as to the application of the rule."^{14/} Similarly, the Commission denied respondents' petition for extraordinary review, finding nothing to warrant departure from regular procedures.

In that the administrative law judge based his legal conclusion that Exxon was not subject to § 102(2)(C) of NEPA on § 1.82(d) of the FTC regulations, it is extremely unlikely^{that} the Commission ultimately will decide that an EIS is a pre-requisite of a final order. Nor was the judge's ruling related to factual considerations wherein a fuller administrative record might aid judicial review.

Thus, with respect to the issue now before the Court, plaintiffs have exhausted all avenues of administrative review. The fact that the adjudicative proceeding has not yet come to a close does not prevent this Court from concluding that plaintiffs have exhausted their

administrative remedies. See generally *Pepsico, Inc. v. FTC*, 472 F.2d 179, 186 n.7 (2d Cir. 1972) (Friendly, C.J.), cert. denied, 414 U.S. 876 (1973).

Final Agency Action/Ripeness

The Court has jurisdiction to review the FTC's failure to file an EIS adjunct to its enforcement proceeding against the plaintiffs only if the institution of that proceeding may be considered "final agency action for which there is no other adequate remedy in a court."

5. U.S.C. § 704. It is therefore necessary to define what is meant by "final agency action" and to see if the action taken by the FTC comes within that definition. The legislative history of the statute is not very helpful, see *Pepsico, Inc.*, supra at 186, but the cases undertake a functional analysis of this chameleon-like concept.

This point was explained in *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80 (N.D. Ill. 1972). Plaintiffs therein sought to enjoin Edison's acquisition of land for a nuclear power plant pending the Atomic Energy Commission's filing of an EIS. The Commission moved to dismiss for lack of jurisdiction. Since jurisdiction had been asserted pursuant to 5 U.S.C. § 704, the district court had to

decide whether the Commission's failure to file an EIS constituted "final agency action." The court opined that

The AEC's alleged failure to act can constitute "final agency action" only if it can be established that the AEC has a clear legal duty under NEPA so to act. Absent such a duty, the AEC's inaction cannot be construed as final, for "final" necessarily implies that nothing is forthcoming in a certain course of action. . . . [T]he AEC's alleged present failure to prepare an environmental analysis prior to Edison's land acquisition cannot be considered final unless (1) the AEC has a clear statutory duty to prepare it prior to that time and (2) the land acquisition has occurred without the AEC's preparation of the analysis

356 F. Supp. at 84.

In accord with this reasoning, assuming, arguendo, that FTC rule 1.82(d) does not immunize Commission enforcement proceedings from the mandate of § 102(2)(C) of NEPA, the mere institution of the Exxon action may be viewed as "final action" only if the FTC was required to have filed an EIS prior to commencement of the proceeding. In this regard, the Commission argues that environmental considerations are irrelevant unless and until a violation is found and that, if a violation is found and a remedy formulated, plaintiffs will have ample opportunity to press their NEPA claims. The purpose of the Commission action, however, is

not to secure a declaratory judgment that respondents' activities violate the FTCA but to end such violations and prevent their recurrence. Admittedly, the procurement of a remedy hinges on the Commission finding that the oil companies are in fact violating the antitrust laws, but so does the success of any agency proposal depend upon many nonenvironmental factors.

The fact that a particular proposal might be abandoned somewhere along the reviewing road has never justified postponing environmental considerations until a final decision has been reached. See, e.g., Greene County Planning Bd. v. FPC, 455 F.2d 412, 418-22 (2d Cir.), cert. denied, 409 U.S. 849 (1972).^{15/} NEPA requires more than an after-the-fact acknowledgment of the environmental consequences that will flow from agency action; it requires that those consequences be examined in considering whether to undertake such action. Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328, 335-36 (2d Cir. 1974); Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 511 (D.C. Cir. 1974), Greene County Planning Bd. v. FPC, 455 F.2d 412, 418-22 (2d Cir.), cert. denied, 409 U.S. 849 (1972); Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1127-29 (D.C. Cir. 1971) (Wright, J.).^{16/}

In Calvert Cliffs', supra, the petitioners challenged rules of the Atomic Energy Commission ("AEC") concerning certain nuclear facilities for which construction permits had been granted prior to the effective date of NEPA. The court of appeals ordered the AEC to revise its rules so that a full consideration of environmental issues would not await the operating license proceedings, a time when construction of the facilities already would have been completed. Judge Wright, speaking for the court, feared that at this stage

there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the Commission's options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

449 F. Supp. at 1128.

This analysis compels the conclusion that if the FTC is required to file an EIS, it must do so before it decides to proceed on a course of action which has as its goal an object that will significantly affect the environment.

The cases of PepsiCo, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973), and Bristol-Myers Co. v. FTC, 469 F.2d 1116 (2d Cir. 1972), do

not weaken the Court's conclusion that plaintiffs herein meet the requirements of 5 U.S.C. § 704. PepsiCo involved the denial of a motion to dismiss for nonjoinder of 513 Pepsi bottlers, after the FTC had granted the motion of the two bottlers that desired to intervene. The court affirmed the decision below, 343 F. Supp. 396 (S.D.N.Y. 1972) (Cannella, J.), concluding that plaintiffs did not prove that without joinder of all the bottlers the administrative proceedings would result in a void order. Indeed, the Second Circuit found that the "decision whether to accede to PepsiCo's request for joinder was within the Commission's discretion." Id. at 190.^{17/} This situation is clearly distinguishable from the case before the Court. If § 102(2)(C) applies to FTC enforcement proceedings, the Commission is under a mandatory obligation to file an EIS at the commencement of the action. Failure to comply with this absolute requirement would operate to invalidate any order issuing from the administrative proceeding.

The FTC investigation in Bristol-Myers, supra, had not proceeded even to the point where a formal complaint was issued when Bristol-Myers sought to compel the Commission to issue subpoenas to aid the company's evidence-gathering. When the request was denied Bristol-Myers brought an action in district court. The Second

Circuit affirmed the district court's refusal to intervene at this stage of the investigation, finding that Bristol-Myers would be afforded ample opportunity to present its claim to a court of appeals when and if a final cease and desist order issued. The court recognized that some circumstances may "justify interlocutory resort to corrective judicial process," 469 F.2d at 1118, but concluded that this was not such a case. By contrast, this Court finds that the instant alleged violation of § 102(2)(C) of NEPA--a major implementing vehicle for significant substantive legislation--compels immediate judicial intervention.

If the FTC is required to comply with § 102(2)(C) of NEPA, it violated a mandatory statutory obligation when it failed to prepare an EIS prior to the commencement of the administrative proceeding. Ergo, the institution of Exxon constitutes "final agency action" for the purpose of giving this Court jurisdiction to decide the remaining claims.

Based upon the foregoing analysis, the Court also finds plaintiffs' claims to be ripe.^{18/}

THE MERITS

Having determined that plaintiffs are proper parties to bring this suit and that the issues are fit for judicial scrutiny at this time, the Court must grapple with the central issue of the instant controversy: Does § 102(2)(C) of NEPA apply to an FTC enforcement proceeding? The Court holds that it does, thereby invalidating § 1.82(d) of the FTC Rules of Practice as inconsistent with a federal statute. See, e.g., Campbell v. Galeno Chem. Co., 281 U.S. 599, 610 (1930) (Brandeis, J.).

The Statute: What It Says; What It Means

The inquiry begins with an examination of both the specific provision in question and the statutory scheme as a whole. Congress' purpose in enacting NEPA, as stated in § 101 of the Act, was "to use all practicable means and measures" to create and maintain a productive harmony between man and his environment by improving and coordinating "Federal plans, functions, programs, and resources" to that end.^{19/} The Report of the Committee on Interior and Insular Affairs on Senate Bill S. 1075 notes with concern that, whereas "[v]irtually every agency of the Federal Government plays some role in determining how well the environment is managed . . . , many of these agencies

do not have a mandate, a body of law, or a set of policies to guide their actions which have an impact on the environment." S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969), 115 Cong. Rec. (Part 14) 19010. (hereinafter "Senate Report"). The success of traditional national policies, designed to increase both the production of goods and our gross national product, has been reaped at the expense of an eroding environment. Thus, § 102 of NEPA "authorizes and directs that, to the fullest extent possible[,]^{20/} . . . all agencies of the Federal Government shall" develop procedures to ensure the consideration of environmental implications in all planning and decision-making, thereby making "environmental protection a part of the mandate of every federal agency and department." Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971); see City of New York v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972) (Three-Judge District Court, Friendly, C.J.); Hearings on S. 1075,^{S.237,} S. 1752 before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969) (hereinafter "Senate Hearings"); 115 Cong. Rec. (Part 30) 40416 (1969).

During the Senate Hearings on the bill, Professor Lynton K. Caldwell of the University of Indiana recognized the need for and urged that the Act contain an "action-forcing,

operational aspect" so that, for example, "Federal agencies, in submitting proposals, [would be required to include therein] an evaluation of the effect of these proposals upon the state of the environment" Senate Hearings, supra at 116. This recommendation was incorporated into the Act as § 102(2)(C). See Senate Report at 20 (Section-by-Section Analysis, Title 1, Sec. 102) 115 Cong. Rec. (Part 30) 40419-20 (1969); see Kleppe v. Sierre Club, ____ U.S. ____, 44 U.S.L.W. 5104, 5107 n.12 U.S. (June 28, 1976).

Federal agencies have complied with NEPA's mandate to varying degrees, see, e.g., Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378, 383-86 (2d Cir. 1975); City of New York v. United States, supra at 158. The FTC has accepted its obligation to prepare an impact statement when a Commission rule, guide, or legislative proposal or report concerns a matter that significantly affects the environment, 16 C.F.R. § 1.82(a),(b), yet has viewed § 102(2)(C) as plainly inapplicable to adjudicatory proceedings brought by the Commission.

The breadth of the triggering clause, however, reflects "the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." Scientists Inst. for Pub. Info. v. Atomic Energy

Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (emphasis added). Therefore, an agency hoping to except certain of its actions--on their face covered by the section--from the impact statement process bears a heavy burden.

The Case Law

The Supreme Court has stated that "NEPA was not intended to repeal by implication any other statute," United States v. SCRAP, 412 U.S. 669, 694 (1973), and that, "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way," Flint Ridge Dev. Co. v. Scenic Rivers Assoc., 21/ U.S. , 44 U.S.L.W. 4954, 4957 (U.S. June 24, 1976). Accord, Colorado Pub. Interest Res. Group, Inc. v. Hills, 420 F. Supp. 582, 584-85 (D. Colo. 1976). Thus, an agency will not be required to prepare an EIS when so doing would be inconsistent with its mandatory duties under a statute.

This can be illustrated best by an examination of cases in which the actions of certain agencies were held exempt from the requirements of § 102(2)(C) of NEPA. Basically, the cases fall into two groups--those dealing with emergency acts or other situations wherein time was of the essence, and those concerning actions taken by the Environmental Protection Agency ("EPA")--and will be treated accordingly.

In *Cohen v. Price Commission*, 337 F. Supp. 1236 (S.D.N.Y. 1972) (Weinfeld, J.), plaintiffs sought a preliminary injunction to restrain transportation-related public agencies from collecting the increased fares and tolls authorized by an order of the Price Commission, on the ground that the Commission failed to prepare an EIS before issuing the order. It therefore was necessary to determine whether "the Price Commission--a temporary agency and one intended to act . . . with dispatch--" id. at 1241, was bound by NEPA's mandates. Judge Weinfeld examined the short-range purposes of the Economic Stabilization Act of 1970 ("ESA") and found that the Commission would be defeated in implementing the ESA's program were it required to undergo the lengthy impact statement process before authorizing an increase in the price of goods. His doubt that it was Congress' intent in enacting the ESA to have its executive arm thus rendered limp and ineffectual was reinforced by "the fact that [Congress] freed the Commission of the normal requirements of the Administrative Procedure Act and limited the powers of the courts to issue injunctive relief." Id. at 1242 (footnotes omitted). Without holding that the Price Commission was exempt from § 102(2)(C) of NEPA, Judge Weinfeld ruled that the issue "pose[d] a substantial initial barrier to

plaintiffs' success upon the trial." Id. For this and other reasons, plaintiffs were denied preliminary injunctive relief.

The reasoning of the Cohen case was adopted by The District Court for the District of Columbia in Gulf Oil Corp. v. Simon, 373 F. Supp. 1102 (D.D.C.), aff'd, 502 F.2d 1154 (T.E.C.A. 1974). In that case the plaintiff oil company sought to set aside certain Federal Energy Office ("FEO") regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 ("Allocation Act") again on the ground that the agency had not prepared an EIS in connection therewith. Based upon the fact that the FEO was required to promulgate the regulations within fifteen days after the passage of the Allocation Act, 15 U.S.C. § 753(a), the court found an "inherent tension between NEPA and the Allocation Act," at least with respect to the regulations at issue. 373 F. Supp. at 1105. The court resolved the conflict by concluding that an EIS was not required in this instance.

Flint Ridge Dev. Co. v. Scenic Rivers Assoc., ____ U.S. ____, 44 U.S.L.W. 4954 (U.S. June 24, 1976), did not involve the kind of "emergency" legislation found in Cohen and Gulf Oil; instead, a specific statutory section

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making time of the essence created "an irreconcilable and fundamental conflict" with § 102(2)(C) of NEPA. Id. at 4957. The statute construed was the Interstate Land Sales Full Disclosure Act ("Disclosure Act"), 15 U.S.C. § 1701 et seq., which requires land developers to file with the Department of Housing and Urban Development ("HUD") a statement of record containing information necessary for the protection of purchasers. In order to shield developers from costly delays resulting from the filing requirement, the Act provides that the statement automatically becomes effective on the thirtieth day after filing, unless the Secretary of HUD finds it inadequate. When petitioner Flint Ridge filed a statement of record, the respondents requested that HUD prepare an EIS before permitting the statement to go into effect. When HUD refused, the Scenic Rivers Assoc. brought suit.

The Court found that the Secretary had no discretion to suspend the statement's effective date for any reason other than inadequacy. It followed that § 102(2)(C) was inapplicable because the Secretary could not, consistent with her duties under the Disclosure Act, satisfy the NEPA impact statement requirement.

The other group of cases to be examined involves

actions taken by the EPA, "an agency whose *raison d'être* is the protection of the environment " *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973) (Leventhal, J.). The common thread of the cases holding that the EPA, in the promulgation of rules or the approval of state implementing plans, was not bound by § 102(2)(C) of NEPA was that the decision-making process of the EPA necessarily involved the same environmental considerations as would have been contained in an impact statement. See, e.g., Environmental Def. Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973); *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, *supra*; *Appalachian Power Co. v. EPA*, 477 F.2d 495, 508 (4th Cir. 1973). In Portland Cement, for example, the Administrator of the EPA promulgated, pursuant to § 111 of the Clean Air Act ("CAA"), rules governing the emission of air pollutants from cement plants. The plaintiff cement company sought judicial review of those standards, claiming that the EPA had not complied with § 102(2)(C) of NEPA. The circuit court's holding that an impact statement was not required was bolstered by certain aspects of the legislative history^{22/} and by the relevant case law, but rested

on the finding that § 111 of the CAA, "properly construed, requires the functional equivalent of a NEPA impact statement." Id. at 384.

Mindful of the broad sweep of the section's triggering clause as well as the rationale for such an action-forcing provision, courts have refrained from carving out an across-the-board exception for the EPA. In order not to be blinded by the EPA's stated purposes and to ensure that the functional equivalent of an EIS actually takes place, the courts have chosen, instead, to create exceptions on a case-by-case basis. See, e.g., Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 374, 380-84 (D.C. Cir. 1973), and authorities cited therein. But see Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173-74 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1, 9 (3d Cir. 1973).

The situations presented by the above two groups of cases are clearly distinguishable from the instant suit. Contrary to the Commission's arguments, the FTC's enforcement of the antitrust laws by way of administrative adjudicatory proceedings does not require the same degree of dispatch as does the implementation of the legislation involved in Cohen, Gulf Oil and Flint Ridge. Antitrust litigation usually is painfully slow and the Exxon action promises to be no exception. Indeed, the plaintiffs noted

that, at the end of 1974, the Commission projected a trial date of January 1978, more than four years after the commencement of the proceeding.^{23/}

Nor do the opportunities for environmental consideration in an FTC enforcement proceeding even approach "the functional equivalent of a NEPA impact statement," *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d at 384, such that literal compliance with § 102(2)(C) might be labeled "a legalism carried to the extreme," *International Harvester Co. v. Ruckelshaus*, 478 F.2d at 650 n.33. In contrast to the procedures undertaken by the EPA in cases holding certain EPA actions exempt from NEPA, there are no FTC regulations mandating consideration of the environmental implications of Commission enforcement proceedings. The FTC argues that respondents may advance their environmental claims at the remedy stage of the proceedings, but this would not be equivalent to compliance with § 102(2)(C). Functional compliance with the impact statement process would require the FTC's consideration of environmental consequences at a time when it could make a difference--prior to the commencement of the proceedings. See notes 15-16 and accompanying text, supra.

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Accordingly, this Court disagrees with the FTC's interpretation of § 102(2)(C) of NEPA as embodied in § 1.82(d) of the Commission's Rules of Practice and today holds that FTC enforcement proceedings are federal actions subject to § 102(2)(C) of NEPA "when their scope and impact on the environment are significant."^{24/} In so doing, the Court is cognizant that its decision runs counter to the opinions of the Council on Environmental Quality ("CEQ") and apparently the only case to have considered the precise issue, *Gifford-Hill & Co., Inc. v. FTC*, 523 F.2d 730, 733 n.7 (D.C. Cir. 1975) (per curiam), aff'g 389 F. Supp. 167 (D.D.C. 1974).^{25/}

The CEQ was established pursuant to Title II of NEPA, 42 U.S.C. §§ 4341-47, and is charged with, inter alia, studying the activities of the federal agencies as they relate to NEPA. Pursuant to that authority, as well as § 20(d) of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4372(d) and § 3(a),(h) of Executive Order 11514, March 5, 1970, 35 Fed.^{Reg.} 4247 (42 U.S.C. § 4321, at 113); see *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309-10 (Douglas, J. as Circuit Justice), the CEQ issued an Advisory Memorandum on the "Application of the National Environmental Policy Act to Enforcement of

the Anti-Trust Laws by the Federal Trade Commission" ("Advisory Memorandum").^{26/} Accordingly, the Council's opinions should not be lightly disregarded. EDF v. TVA, 468 F.2d 1164, 1177-78 (6th Cir. 1972).

The CEQ concluded in its Advisory Memorandum that the environmental impact process was inapplicable to FTC antitrust proceedings and that, therefore, § 1.82(d) of the Commission's Rules of Practice was consistent with NEPA. That conclusion stemmed from the Council's rejection of what it articulated as the two possible rationales for holding otherwise:

First an impact statement should be required to determine whether a statutory prohibition should be condoned, or allowed to continue, because of the potential environmental harm from remedying the violation. Or second, an impact statement should be required because alternative solutions exist to remedy the alleged violation, and the choice among these alternative solutions should depend, at least in part, on a detailed study of their environmental implications.

Advisory Memorandum at 19.

The CEQ rejected the first rationale because, in its view, the impact statement process would impede enforcement of the antitrust laws through delays, consumption of resources and a heavy imbalance in the elements of prosecutorial discretion. The Council recognized that the delay

and increased cost of administrative action occasioned by compliance with § 102(2)(C) was not in and of itself sufficient justification for an exception, but deemed this inconvenience "particularly important in certain law enforcement situations, where the government must be able to negotiate and to act quickly," id. at 20. The need for prompt action in antitrust prosecutions, which premise itself may be questioned,^{27/} however, does not qualify as a statutory mandate so as to render the dictates of NEPA inconsistent with superceding statutory authority. Compare Flint Ridge Dev. Co. v. Scenic Rivers Assoc., ____ U.S. ____, 44 U.S.L.W. 4954 (U.S. June 24, 1976); Gulf Oil Corp. v. Simon, 373 F. Supp. 1102 (D.D.C.), aff'd, 502 F.2d 1154 (T.E.C.A. 1974); Cohen v. Price Comm'n, 337 F. Supp. 1236 (S.D.N.Y. 1972) (Weinfeld, J.). And the law is clear that, absent a clash of statutory authority, increased cost or delay does not excuse the impact statement requirement. See Natural Resources Def. Council, Inc. v. United States Nuclear Reg. Comm'n, 539 F.2d 824, 843 (2d Cir. 1976); Greene County Planning Bd. v. FPC, 455 F.2d 412, 422-23 (2d Cir.), cert. denied, 409 U.S. 849 (1972); Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1128 (D.C. Cir. 1971). In Greene County supra at 422-23, Chief Judge Kaufman stated:

Fully recognizing that delay unfortunately is incident to our mandate and [the Power Authority of the State of New York's] claim that the Blenheim-Gilboa Project is a vitally needed power facility, we can only add our voice to that of the District of Columbia Circuit in Calvert Cliffs: Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis "must not be used to create a blackout of environmental consideration in the agency review process." 449 F.2d at 1122.

Similarly, the Court finds unpersuasive the CEQ's argument that application of § 102(2)(C) to enforcement proceedings would create an imbalance in agency decision-making. Prosecutorial discretion involves a complex mix of discrete factors; after the passage of NEPA, the addition of the "environmental" ingredient of course changed the composition of the mix but did not eliminate any of the other factors. The fact that this "environmental" ingredient is the product of a more lengthy and formal process does not necessarily give it the dominating effect feared by the CEQ.

The CEQ also contends that compliance with § 102(2)(C) of NEPA would cause unproductive litigation because, "[i]n many, if not most, cases, the proposed defendant would find it in his best interest to litigate whether an impact statement should be prepared, and if one

was prepared, the adequacy of the agency's environmental analysis." Advisory Memorandum at 21-22. Recognizing that the possibility of litigation by a party adversely affected by agency action is a by-product of the section, the Council nonetheless argued that in antitrust enforcement proceedings "this incentive to sue would lie with the party able to structure, at least in a divestiture case, the environmental consequences that might result from the divestiture." Id. at 22.

Without regard to the validity of this argument in a proper case, it is simply inapposite here. The environmental consequences of the proposed relief in Exxon will occur if the FTC is successful in attaining the remedies it seeks. The environment will be affected by virtue of the administrative order, not independent actions undertaken by the Exxon respondents.

In rejecting the second rationale for the applicability of § 102(2)(C) to FTC enforcement proceedings, the CEQ found of great significance the fact that "many of the objectives underlying the impact statement process will frequently be achieved in a law enforcement adjudicatory proceeding, even without a formal requirement for an impact statement." Id. at 23. This conclusion seems to be based

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upon two propositions of doubtful validity: (1) that the FTC voluntarily will consider the environmental consequences of its actions; and (2) that an environmental analysis filed by respondents at the remedy stage of an enforcement action will contribute significantly to the formulation of an ultimate remedy.

The applicability of the Council's first postulate is severely undercut by the language of § 102(2)(C)--the "action-forcing" provision of NEPA--and the reasons for its addition to the Act. The difference between the general directives of § 101 of NEPA and the specific mandates of § 102 was articulated by Judge Wright:

Unlike the substantive duties of Section 101(b), which require agencies to "use all practicable means consistent with other essential considerations," the procedural duties of Section 102 must be fulfilled to the "fullest extent possible." This contrast, in itself, is revealing. But the dispositive factor in our interpretation is the expressed views of the Senate and House conferees who wrote the "fullest extent possible" language into NEPA. They stated:

" [T]he language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."

Calvert Cliffs', supra, 449 F.2d at 1114-15 (footnotes omitted) (emphasis added); see note 20, supra. The effectiveness of NEPA was not left to the vagaries of voluntary compliance.

The CEQ's second premise also must fall. The Council itself has recognized the importance of preparing and circulating draft environmental impact statements "early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved." Greene County Planning Bd. v. FTC, supra, 455 F.2d at 421, quoting 36 Fed. Reg. 7724 (April 23, 1971). This Court already has noted that at the relief stage of an enforcement proceeding there is too great a tendency to accept as inevitable adverse environmental consequences, thereby nullifying their input into the decision-making process.

Moreover, without being subject to the dictates of § 102(2)(C), there is a danger that the Commission will wrongly assume that enforcement proceedings are exempt as well from the more general directives of NEPA. Under such circumstances, the FTC will have no incentive to heed the respondents' warnings concerning the environment, assuming that its sole mission is to enforce the antitrust laws, and the very purpose of NEPA will have been defeated.

CONCLUSION

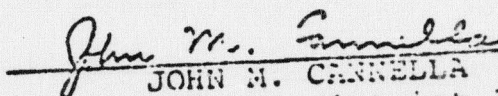
Wary that the federal agencies would not implement the policies of NEPA on their own, Congress inserted an "action-forcing" provision into the Act. Viewed in this light, the CEQ's arguments against its applicability to FTC enforcement proceedings seem naïve at best. The weight attached to the CEQ's opinion must not override the fulfillment of judicial responsibility "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." Calvert Cliffs', supra, 449 F.2d at 1111.

The Court recognizes that its ruling today may signal an occasional decision not to prosecute anti-trust violators for the sake of preserving our environment. It must be remembered, however, that the decision whether to go forward notwithstanding adverse environmental impact rests with the Commission. It is their obligation, not the Court's, to weigh alternatives. In the rare case where the FTC determines that the severity of the offense does not justify the environmental cost of remedying it, ^{28/} no doubt we all will be better off bearing with the noncompetitive effects rather than paying for competition with our natural resources. Federal agencies

often have to choose from among evils. NEPA was designed to inject environmental consequences into that equation.

Accordingly, § 1.82(d) of the FTC's Rules of Practice, which purports to withdraw a substantial part of the Commission's activities from the scope of § 102(2)(C) of NEPA, is hereby declared null and void. Additionally, since the relief proposed in Exxon would operate to "restructure the petroleum industry and alter the manner in which oil, a depletable natural resource, is produced, distributed and used,"^{30/} the Court finds that Exxon is a "major federal action significantly affecting the quality of the human environment" as that phrase is used in § 102(2)(C) of NEPA.^{31/} The FTC does not really dispute this. Pursuant to this grant of summary judgment in favor of the plaintiffs, Fed. R. Civ. P. 56, the Commission is hereby ordered immediately to begin compliance with the section's mandate by preparing a draft environmental impact statement.

SO ORDERED.


JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
March 1, 1977.

FOOTNOTES

- 1/ Prediscovery Statement of February 22, 1974.
- 2/ Complaint, Mobil Oil Corp. v. FTC, 75 Civ. 2748,
at 4.
- 3/ The statute reads in pertinent part:

The Congress authorizes and directs
that, to the fullest extent possible: . . .
(2) all agencies of the Federal Government
shall--

(C) include in every recommendation or
report on proposals for legislation and other
major Federal actions significantly affecting
the quality of the human environment, a de-
tailed statement by the responsible official
on--

(i) the environmental impact of
the proposed action,

(ii) any adverse environmental
effects which cannot be avoided should
the proposal be implemented,

(iii) alternatives to the proposed
action,

(iv) the relationship between local
short-term uses of man's environment and
the maintenance and enhancement of long-
term productivity, and

(v) any irreversible and irretriev-
able commitments of resources which would
be involved in the proposed action should
it be implemented.

Prior to making any detailed statement, the re-
sponsible Federal official shall consult with
and obtain the comments of any Federal agency

which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes

.....

4/ This administrative ruling provides that

Nothing in this procedure shall be construed as stating or implying that the requirements of section 102(2)(C) of the National Environmental Policy Act apply to: Any investigation made by the Commission for law enforcement purposes; any process or order issued by the Commission in connection with any type of investigation; any agreement of voluntary compliance or consent decree entered into by the Commission; or any adjudicatory proceedings commenced by the Commission.

16 C.F.R. § 1.82(d).

5/ Even where the litigant has alleged injury in fact to an interest arguably within the zone of interests to be protected or regulated by a particular statute, the party may be barred from seeking judicial review of agency action "if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow v. Collins*, 397 U.S. 159, 165 (1970); 5 U.S.C. § 701(a).

The clear mandate of NEPA--that all federal agencies shall prepare an environmental impact statement prior to taking a major federal action that may "significantly [affect] the quality of the human environment," 42 U.S.C. § 4332(2)(C)--belies any suggestion that judicial review is precluded in this case.

6/

The "injury in fact"/"zone of interests" test was used by Justice Douglas to clarify the general concept of standing. Indeed, the very language used in § 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, was viewed as no more than an application of the law of standing to the situation where the injury alleged has been caused by action taken by an administrative agency--not as creating new standing criteria for use in a particular context. See generally Flast v. Cohen, 392 U.S. 83, 101-02 (1968). Notwithstanding the Court's analysis in Data Processing, subsequent Supreme Court decisions have characterized the "injury in fact"/"zone of interests" test as peculiarly applicable in cases brought pursuant to § 10 of the APA--probably because Data Processing involved the operation of that provision. See Sierra Club v. Morton, 405 U.S. 727, 732-33 (1972). The question whether use of this standing test would be appropriate in a non-administrative context, however, need not be decided today because plaintiffs' allegations fit precisely within § 10 of the APA.

7/

That the challenged agency action had nationwide applicability and thus, it was alleged, would affect adversely the natural resources all across the country was not seen as an impediment to the environmentalists' standing. The Court observed that "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." 412 U.S. at 688.

Similarly, the fact that the "line of causation" to the alleged injury was attenuated did not prove fatal to plaintiff's standing:

Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.... But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible

harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected. If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.

Id. at 688-89 (footnotes omitted). See City of Hartford v. Town of Glastonbury, No. 76-6049 (2d Cir. Dec. 23, 1976), slip op. at 1093. See generally Duke City Lumber Co. v. Butz, 382 F. Supp. 362, 369 n.15 (D.D.C. 1974), aff'd per curiam, 539 F.2d 220 (D.C. Cir. 1976).

8/ Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 15.

9/ Kilcarr Affidavit dated 7/31/75, at 3.

10/ Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 17.

11/ The court dismissed plaintiff's argument, that divestiture of a company that provided it with sand and gravel would force plaintiff to open additional strip mines, as not constituting an allegation of injury in fact.

12/ A final cease and desist order may be appealed to a circuit court of appeals. 15 U.S.C. § 45(c).

13/ See note 4 supra.

14/ Exxon, Order denying respondents' request for order granting leave to appeal order denying motion of respondents to require complaint counsel to file environmental impact statement (EPC Feb. 25, 1975).

15/

A degree of doubt has been cast on the continuing vitality of the Second Circuit's holdings in Greene County, as well as in Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (2d Cir. 1971), and Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974), by the Supreme Court's holding in Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289 (1975). In that case, the Supreme Court interpreted the provision in NEPA, that the EIS "shall accompany the proposal through the existing agency review processes," 42 U.S.C. § 4332(2)(C), as not affecting the timing of the statement but only "what must be done with [it] once it is prepared" Id. at 320. The Court then noted that "[t]o the extent to which [the above cases] read the requirement . . . differently, they would appear to conflict with the statute." Id. at 321 n.20. However, the Supreme Court did not otherwise question the Second Circuit's reasoning in these cases.

16/

Although "impact statements ought not to be modeled upon the works of Jules Verne or H.G. Wells[,] . . . they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process." Scientists' Inst. For Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1093-94 (D.C. Cir. 1973).

17/

The Second Circuit, per Judge Friendly,

extrapolate[d] from cases such as Leedom v. Kyne, 358 U.S. 184 . . . (1958), and McCulloch Sociedad Nacional de Marineros, 372 U.S. 10 . . . (1963), a principle that one can find "final agency action for which there is no other adequate remedy in a court" if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order. The injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding, which Myers [v. Bethlehem Corp.] held not to be enough, 303 U.S. [41,] 51-52 . . . [(1938)], but, in a case like this, the enormous waste of governmental

resources and the continuing threat of a complete restructuring of an industry.

472 F.2d at 187 (footnote omitted).

18/ Justice Harlan articulated the basic rationale of the ripeness doctrine:

to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Because a functional analysis was undertaken by the Court in deciding that the Commission's commencement of Exxon sans EIS was "final agency action" within the contemplation of 5 U.S.C. § 704, the conclusion is compelled that this controversy is ripe. The applicability of § 102(2)(C) of NEPA to the Exxon enforcement action is an issue fit for judicial decision: if the FTC must file an EIS, it already should have done so. More significantly, postponement of judicial intervention pending a final cease and desist order might yield profound and irrevocable environmental consequences for the parties as well as generations of Americans. Where, as here, the need for relief is immediate and definite, compare Daley v. Mathews, 536 F.2d 519, 521-22 (2d Cir. 1976), judicial review of agency action is warranted.

19/ The section provides:

(a) The Congress, recognizing the profound impact of man's activity on the inter-

relations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural and natural aspects of our national

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heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4331.

20/

Judge Wright urgently stressed

that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971); see "Major Changes in S. 1075 as Passed by the Senate," 115 Cong. Rec. (Part 30) 40417-18 (1969); H.R. Conference Report, 115 Cong. Rec. (Part 29) 39702-03 (1969).

21/

The agencies are directed to comply with § 102 of NEPA "to the fullest extent possible." But see note 20 supra; see 42 U.S.C. § 4335.

22/ By contrast, there is nothing in the Act itself or the legislative comments accompanying its passage to suggest that FTC enforcement proceedings are not included within the section's reach.

23/ Memorandum in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment, at 11.

24/ Plaintiffs' Statement Pursuant to Local Rule 9(g) ¶ 12, at 3.

25/ The circuit court affirmed the denial of preliminary injunctive relief "[w]ithout considering the merits of the NEPA complaint" 523 F.2d at 731. Having decided that plaintiffs lacked standing to press NEPA claims and that their suit was premature, it was unnecessary to reach the issue whether FTC enforcement proceedings are included within § 102(2)(C) of NEPA. Nonetheless, the circuit court noted:

We recognize that our holding effectively means that an agency's decisions to institute adjudicatory proceedings, and a fortiori its decisions to institute investigations to determine whether adjudication is warranted, are outside the scope of NEPA. Since these decisions in no way foreclose the agency from considering environmental factors before making a final decision to require some action, we are convinced that this result is proper. The decision to investigate or to adjudicate does not involve the type of "irretrievable commitment of resources" which NEPA insists must follow rather than precede consideration of environmental factors.

523 F.2d at 733 n.7, quoting Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1098 (D.C. Cir. 1973).

To the extent that the above language of Gifford-Hill is inconsistent with today's holding, the Court declines to follow it.

26/ The memorandum, prepared at the request of the FTC, was triggered by the action in Gifford-Hill and was issued while the case was pending before the appellate court.

27/ See text accompanying note 23 supra.

28/ That such a situation would be rare indeed finds support in the CEQ's Advisory Memorandum:

We find it difficult to imagine a proposed divestiture case under the Clayton Act or the Federal Trade Commission Act where the likely environmental consequences would be so significant to justify subjecting the decision on whether to prosecute to the requirements of the impact statement process.

Advisory Memorandum, at 21. The Council somehow sees in the infrequency of environmental impact a justification for foregoing the process entirely.

Section 102(2)(C) is not aimed at providing busy-work for federal agencies: where agency action obviously has no environmental impact, compliance involves no more than making that initial determination.

29/ See National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

30/ Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 36.

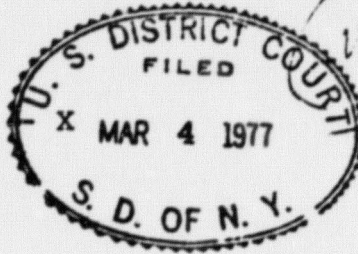
31/ See text accompanying notes 7-10 supra. The Court recognizes that the test for determining plaintiffs' standing to raise NEPA claims--environmental injury in

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fact--lacks the element of magnitude written into the standard for deciding whether a particular agency action necessitates the filing of an EIS. In this case, however, plaintiffs' arguments in favor of their standing reveal not only that the Commission's proposed relief would affect the environment but that this effect would be significant.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



MOBIL OIL CORPORATION, GULF OIL
CORPORATION, SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs,

-against-

75 Civ. 2748
(JMC)

FEDERAL TRADE COMMISSION; and
LEWIS A. ENGMAN, Chairman,
PAUL RAND DIXON, Member,
MARY ELIZABETH HANFORD, Member,
STEPHEN NYE, Member, and MAYO J.
THOMPSON, Member and CHARLES A. TOBIN,
Secretary; as officers of the
FEDERAL TRADE COMMISSION,

45651

Defendants.

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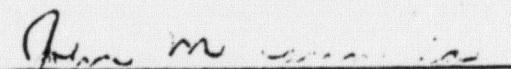
E R R A T U M

CANNELLA, D.J.:

The Opinion of the Court in the above matter,
dated March 1, 1977, is hereby revised by amending the
first line of the last paragraph on page 3 to read:

On June 6, 1975, four of the
eight Exxon re-

SO ORDERED.


JOHN M. CANNELLA, U.S.D.J.

Dated: New York, N.Y.
March 3, 1977.

(13)

(1) enjoining the Federal Trade Commission ("FTC") its officers, employees and those acting on its behalf from taking any further action in the FTC adjudicative proceeding F.T.C. Docket No. 8934, In the Matter of Exxon Corp. et al ("Exxon"), including institution of federal court proceedings to enforce subpoenas duces tecum recently issued by the Administrative Law Judge in that case.

until such time as the Federal Trade Commission, in accordance with the requirements of 42 U.S.C. §4332:

- a. Consults with and obtains the comments of any federal agency which has jurisdiction by law or special expertise with respect to the environmental impact of the relief proposed in Exxon;
- b. prepares, subsequent to compliance with paragraph (a) above, a detailed environmental impact statement;
- c. makes copies of said detailed statement available to the President, the Council on Environmental Quality and the public; and
- d. places said detailed statement in the record in Exxon.

(2) Retaining jurisdiction pending compliance with paragraph (1) above.

(3) In the event this case has been closed following the Declaratory Judgment and Order of this Court dated March 1, 1977, reopening this cause of action for consideration of the injunctive relief requested in paragraphs (1) and (2).

Dated: New York, New York

March , 1977

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY AND STANDARD OIL COMPANY OF CALIFORNIA,	:	
	:	
Plaintiffs,	:	AFFIDAVIT IN SUPPORT OF INJUNCTIVE RELIEF ON ORDER TO SHOW CAUSE
-against-	:	
FEDERAL TRADE COMMISSION; and LEWIS A. ENGMAN, Chairman, PAUL RAND DIXON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN NYE, Member, and MAYO J. THOMPSON, Member and CHARLES A. TOBIN, Secretary; as officers of the FEDERAL TRADE COMMISSION,	:	75 Civ 2748 (JMC)
	:	
Defendants.	:	

-----x

State of New York)
) ss:
County of New York)

ANDREW J. KILCARR, being duly sworn, deposes and says:

1. I am a member of the firm of Donovan Leisure Newton & Irvine, and am counsel to plaintiff Mobil Oil Corporation ("Mobil") in this action as well as in the related Federal Trade Commission case known as In the Matter of Exxon Corporation, et al. (Docket No. 8934 - hereinafter "Exxon"). I am familiar with the facts and proceedings described herein and I submit this affidavit in support of plaintiffs' request for an injunction pursuant to 28 U.S.C. §2202.

2. This action was instituted June 6, 1975 pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq ("NEPA") to enforce compliance with the dictates of that Act.

3. On July 18, 1973, defendants herein issued the complaint in Exxon against plaintiffs and four other oil companies charging them with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

4. At the time this action was instituted and brought on for summary judgment, the Exxon case was in the preliminary motion stage and Federal Trade Commission ("Commission" or "FTC") counsel had not commenced substantive discovery.

5. On November 24, 1976, presiding Administrative Law Judge Alvin L. Berman issued subpoenas duces tecum to respondents in Exxon, including plaintiffs herein. A technical error by Commission counsel caused a reissuance of the Mobil subpoena on January 17, 1977. The subpoenas issued against the Exxon respondents are substantively identical and will hereinafter be referred to as "the subpoena or subpoenas."

6. The subpoenas require plaintiffs to produce substantial quantities of documents and other material, including documents which contain highly confidential and proprietary information which would be of significant value to competitors if disclosed, resulting in competitive harm to said respondents.

7. Mobil Oil Corporation is scheduled to commence production of documents and other materials in response to the subpoena at its New York headquarters on March 9, 1977. Thereafter, and with the agreement of Commission counsel, Mobil is scheduled to continue its production until completion on or about April 6, 1977. Other respondents, including plaintiffs herein, are also scheduled to produce in response to the subpoenas during the coming weeks. On information and belief, Mobil is scheduled to be the first respondent to commence producing in response to the subpoenas.

8. Certain plaintiffs have not agreed to produce confidential material pursuant to the subpoena until entry of a satisfactory protective order. Pending entry of such protective order, these plaintiffs have agreed to permit Commission counsel to inspect this confidential material.

9. To secure entry of a protective order covering respondents' confidential and other material, plaintiffs and three other respondents instituted suit on February 18, 1977 in the United States District Court for the District of Delaware. Shortly thereafter, to enforce compliance with the subpoena as to confidential material, Commission counsel initiated administrative proceedings with Administrative Law Judge Berman which point toward institution of an enforcement proceeding de novo in a federal district court of Commission counsel's choosing. Plaintiffs are due to respond and will respond to this enforcement effort today by filing papers with the presiding Administrative Law Judge in Exxon.

10. Respondents' compliance efforts as described above and as to the subpoenas signifies the onset of a major phase of the Exxon proceeding requiring substantial commitments of both respondent and government resources. For fiscal 1977, Congress in response to the FTC's request, has appropriated \$6 million dollars for the Exxon case. More specifically, this money was appropriated to defray the costs of the massive discovery program contemplated by the Commission for this period.

11. Compliance efforts by plaintiffs pursuant to the subpoenas, and subsequent related discovery, will result in the production of enormous quantities of material at a cost to plaintiffs in the tens or hundreds of millions of dollars.

12. The presently scheduled discovery in Exxon will occur without consideration of important environmental factors as required by NEPA.

BACKGROUND OF THE PENDING
SUBPOENAS DUCES TECUM

13. On February 20, 1976, Commission counsel in Exxon filed with presiding Administrative Law Judge Alvin L. Berman a motion for issuance of subpoenas duces tecum to respondents in that proceeding. The February 20th motion, including subpoena specifications, definitions, instructions and statements of justification, exceeded 1,800 pages in length and contained more than 700 numbered specifications and approximately 5,000 separate requests for documents and information. Commission counsel conceded that the February 20th subpoena motion requested documents numbering in the "tens of millions."

14. On July 6, 1976, respondents including plaintiffs herein, filed joint as well as individual responses to Commission counsel's February 20th motion, addressing, inter alia, the burdens attendant to compliance with the then-proposed subpoena. Respondents estimated that compliance with such subpoena would necessitate file searches of more than 2,500,000,000 document pages, at a cost to the companies of hundreds of millions of dollars.

15. On September 3, 1976, Commission counsel filed a modified subpoena request consisting of approximately 950 pages in three separate volumes and containing more than 500 numbered specifications and approximately 4,000 separate requests for documents and information. In plaintiffs' October 20, 1976 individual responses to the September 3rd subpoena request, it was estimated that com-

pliance with such subpoenas would require file searches of hundreds of millions of document pages.

16. By Order dated November 11, 1976, the Administrative Law Judge provisionally denied portions of the February 20th and September 3rd subpoena applications without prejudice to their renewal, and authorized preparation by Commission counsel of subpoenas duces tecum in accordance with guidelines set forth in that Order. By Order dated November 24, 1976, the Administrative Law Judge issued, with minor modifications, the submitted subpoenas duces tecum.

17. Commission counsel in Exxon have appealed to the FTC the Order of November 11, 1976 to the extent it denies, without prejudice to later renewal portions of the September 3rd subpoena application. The FTC has not yet ruled on Commission counsel's appeal.

DECLARATORY JUDGMENT

18. On cross motions for summary judgment and supporting memoranda this Court granted plaintiffs' motion for summary judgment herein by opinion and order dated March 1, 1977 and ordered defendants to immediately commence preparation of an Environmental Impact Statement ("EIS"). In the March 1 Order this Court found that the institution by FTC of the Exxon proceeding constitutes "a major Federal action significantly affecting the quality of the human environment," as that phrase is used in §102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), and ordered the FTC "immediately to begin compliance with the [NEPA] section's mandate by preparing a draft environmental impact statement." Slip Opinion at 41. The March 1 Order also declares invalid §1.82(d) of the Commission Rules of Practice which has purported to exempt FTC enforcement proceedings from the requirements of NEPA.

THE NECESSITY FOR INJUNCTIVE RELIEF

19. In its Opinion, the Court stated that

at the relief stage of an enforcement proceeding there is too great a tendency to accept as inevitable adverse environmental consequences, thereby nullifying their input into the decision-making process (Slip Opinion at 39)

and observed:

Functional compliance with the impact statement process would require the FTC's consideration of environmental consequences at a time when it could make a difference - prior to the commencement of the proceedings. (Slip Opinion at 32).

20. Although an impact statement was not prepared prior to the institution of Exxon, the EIS which this Court has ordered Defendants to prepare can serve its statutory function if prepared promptly and if Exxon does not advance to a state at which the EIS can only be an "after-the-fact acknowledgement of the environmental consequences that will flow from agency action." (Slip Opinion at 19).

21. The present stage of the proceedings in Exxon is the last possible opportunity for the preparation of an impact statement and for meaningful consideration to be given to the EIS itself. As noted above, on March 9, 1977, substantive discovery in Exxon is scheduled to begin with the production of documents under subpoenas issued by the Administrative Law Judge. That discovery will doubtless continue for years and will be particularly protracted in the event that the FTC, as a result of the pending appeal, overrules the Administrative Law Judge and reinstates the subpoenas originally applied for by Commission counsel.

THE SUBPOENA

22. The subpoena, which is submitted as part of the memorandum in support of this motion, seeks collection for analysis of substantial quantities of documents which Commission counsel believe necessary to support the divestiture action which this Court has determined will significantly affect the environment. Implementation of discovery orders in Exxon, will place in litigation precisely those aspects of plaintiffs operations as to which divestiture is sought.

23. The subpoena requires production of documents relating to the entire range of petroleum pipeline ownership and operations, directed to its claim for divestiture of pipeline interests. Broad and detailed Specifications directed to corporate organization explicitly include "transportation operations." See Specifications A2, A4A, A32, A33. Specification D195, D200 and D221 probe information filed with or produced for the Interstate Commerce Commission, the Bureau of Mines, and the Department of Justice, all of which probe pipeline ownership and operations often in microscopic detail, by incorporating by reference broad demands for pipeline data.

24. FTC relief in the form of divestiture of substantial refinery interests, is extensively probed by the subpoena. Corporate organization specifications reach all refinery operations, for example, Specification A-2 expressly calls for detailed information concerning affiliates and subsidiaries engaged in refining, Specification A-3 calls for equally detailed information concerning joint ventures and other arrangements touching refinery operations. All of Part C of the subpoena requires production of minutely detailed information concerning plaintiffs' owned, leased and operated refineries.

25. The FTC's commitment to its discovery, both in terms of manpower and the \$6 million which has been budgeted for this effort this year, would not appear to be conducive to the preparation of an impact statement and consideration of the environmental implications of divestiture, the appropriateness of which Commission counsel presumably intend to demonstrate through their discovery. Moreover, although this Court was not asked to set a date by which a draft EIS had to be prepared and did not do so, given the commitment of complaint counsel to their discovery program - both the subpoenas and the 700 depositions which they have announced they intend to take - it seems unlikely that Commission counsel would be able to devote their efforts to the preparation of an impact statement until the conclusion of their discovery, far in the future. At that point, the EIS would undoubtedly be "an after-the-fact acknowledgement of the environmental consequences that will flow from [Exxon]."

26. In the absence of the injunctive relief requested herein, the discovery sought by Commission counsel will change the character of the Exxon proceeding so as to preclude meaningful consideration of environmental factors as required by NEPA and ordered by this Court.

27. In the absence of the injunctive relief requested herein, functional compliance with NEPA will become unlikely and preparation of the EIS as ordered by this Court will become an exercise in form without substance that is unlikely to protect the interests which this Court has recognized and sought to protect.

28. Continuing prosecution of Exxon, which as been found to be unlawfully instituted, itself constitutes irreparable injury for which there is no adequate remedy at law.

29. Plaintiffs have not made prior application in this action or any other proceeding for the preliminary relief requested in the instant motion on order to show cause or for any relief similar thereto.

WHEREFORE Deponent requests that the injunctive relief requested in the instant motion on order to show cause be granted.


Andrew J. Kilcarr

DONOVAN LEISURE NEWTON & IRVINE
1666 K Street, N.W., Suite 301
Washington, D. C. 20006
Telephone: (202) 785-8900

Sworn to before me this
7th day of March, 1977.


Notary Public

LUICA A. FERBARISE
Notary Public, State of New York
No. 41-00770-00 Qual. in Queens Co.
Cert. expires 12/31/77 in New York County
Commission Expires March 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1977
copies of the foregoing Notice On Order To Show Cause for Injunc-
tive Relief, Affidavit of Andrew J. Kilcarr, and the following
Memorandum In Support, were delivered by hand to each of the
following:

Robert J. Lewis, Esq.
General Counsel
Federal Trade Commission
Washington, D. C. 20580

Gerald Harwood, Esq.
Assistant General Counsel
Federal Trade Commission
Washington, D. C. 20580

John T. Fischbach, Esq.
Federal Trade Commission
Washington, D. C. 20580

Robert B. Fiske, Jr.
U. S. Court House Annex
One St. Andrew Plaza
New York, N. Y.
United States Attorney for the
Southern District of New York

Vincent T. ...

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOBIL OIL CORP., et al,	:	
Plaintiffs,	:	
v	:	75 Civ. 2748
	:	(JMC)
FEDERAL TRADE COMMISSION,	:	
Defendant.	:	

New York, New York
March 9, 1977

Before

JOHN M. CANNELLA, D.J.

Appearances:

DONOVAN LEISURE NEWTON & IRVINE, ESQS.
Attorney for Plaintiff Mobil Oil Corp.
By: ANDREW J. KILCARR, ESQ.
THOMAS R. TROWBRIDGE III, ESQ., of Counsel

NATHANIEL L. GERBER, ESQ.
Assistant United States Attorney
Attorney for Defendant

HOWREY & SIMON, ESQ.
Attorneys for Plaintiff Shell Oil
By: KEITH E. PUGH, JR., ESQ., of Counsel

JOHN E. BAILEY, ESQ.
Attorney for Gulf Oil

THE CLERK: Mobil Oil Corporation vs. Federal Trade Commission.

MR. KILCARR: Plaintiff is ready.

MR. GERBER: Defendant is ready.

THE COURT: After I read the papers in this case, I thought that what I ought to do is take the life expectancy of the lawyers to find out if they were going to be around when this was terminated. Who is talking about ten years? What is going to take ten years in this thing?

MR. TROWBRIDGE: May I dispose of a preliminary matter first.

My name is Thomas Trowbridge of the firm of Donovan Leisure Newton & Irvine. I would like to move the admission for purposes of this motion of my partner, Andrew Kilcarr, who is a member of the Bar of the District of Columbia and the Supreme Court of the United States.

THE COURT: So admitted.

MR. KILCARR: May I try to respond to your Honor's question. It is no secret that the Federal Trade Commission considers the Exxon case the largest case it has ever attempted under the Antitrust Laws. It has projected discovery of unrivaled proportions.

THE COURT: What about the IBM case? That has

millions of documents.

MR. KILCARR: But that is an Antitrust Division. This characterizes a new experience for the Federal Trade Commission. That is their discovery program and that is the quantum of testimony associated with that discovery program.

THE COURT: All right. Well, you may proceed. I will hear you.

MR. KILCARR: May I first, and on the basis of having read the Government's opposition last night, mention at the very outset that we are not -- that is, the plaintiff's are not -- in your Honor's court this morning seeking a preliminary injunction. We are here under an entirely different statutory standing.

Consequently, concepts of irreparable harm, public policy, probable success on the merits simply don't apply. Similarly, the position that the U. S. Attorney would cast plaintiffs in in his belief -- that is, complaining about the cost of litigation -- is simply not our position before your Honor this morning. Certainly the cost of litigation is an incidental feature of why we are here, but it is not the prime feature, and to contend that, I suggest, respectfully, is to misconstrue your Honor's opinion. We are here. We have standing.

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2 THE COURT: You say that there is no relevance
3 at all to the money involved in preparing for this thing
4 under any circumstances? It seems to me that it would
5 be kind of odd to give the Government the power to go out and
6 bring in people and put them in a position where they have
7 to spend so much money to put them out of business.
8 There comes a point in time when something should be done
9 about that.

10 So, I don't know why you beg off completely on
11 that part of it.

12 MR. KILCARR: Not completely, your Honor. I
13 say it is incidental. I say it is secondary. The primary
14 purpose for which we seek further relief from the Court
15 has to do with the environmental considerations which should
16 be considered by the decision makers in the Exxon case
17 now and not subsequently when we get to the remedy stage.

18 THE COURT: Why isn't some of the discovery
19 necessary for that purpose?

20 MR. KILCARR: It might well be, but I
21 sincerely doubt that. As I read Section 1022 (c) of NEPA,
22 which your Honor is very familiar with, the environment
23 impact statement has a life of its own quite apart from what
24 it might be in the hands of prospective divestive
25 companies. For example, they must start by seeking out the

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expertise and opinions of other agencies of the United States Government and state governments, I would assume, that are experienced in refinery operations, that are experienced in pollution, clean air, clean water. All of these environmental oriented agencies must comment.

Having received those comments, then they must prepare an impact statement circulated to the Council on Environmental Quality, to the President, and only after all of that is sorted out, then it goes on the record in the Exxon case.

Then I suggest, your Honor, discovery, if any, concerning the environmental factors should take place, not preliminary to doing that type of work. It is an entirely federal government oriented task that is involved in the preparation of the impact statement. Once the impact statement is on the record, once those priorities are factored in and become an integral part of the whole continuum of decision making in the Federal Trade Commission on this case, then when you have those priorities established, I think the law is clear that then they can seek discovery. Then they can mold and massage environmental factors as compared to what your Honor identified as --

THE COURT: Has this argument been made to the Administrative Judge?

MR. KILCARR: I personally made it twice, your Honor.

THE COURT: Was he persuaded by it?

MR. KILCARR: Indeed not. I take personal delight in your Honor's opinion after two and a half years trying to convince this agency that they are covered by the National Environmental Policy Act of 1969, and they are responsible for compliance with Section 1022(c).

I suggest further, your Honor, as I read the Government's brief last night, although they are prepared it seems to me to prepare an environmental impact statement and assumedly not take an appeal--at least that is how I read the language on the last page of their brief-- but even with that concession, I don't derive, and I suggest respectfully that the Court can't derive a reasonable basis for concluding that any sense of priority, any sense of urgency, any sense of necessity to do the task your Honor tells them to do has in any way impacted on their prosecutorial goals. They still want to get going.

I would suggest that they need an emphatic new prescription, a concentrated diet of environmental consideration surrounding the pipe line and the refinery divestiture.

THE COURT: How long would an impact statement

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2 take to prepare?

3 MR. KILCARR: They have the key to that in
4 their own hands.

5 THE COURT: I know that, but what is your
6 judgment on that?

7 MR. KILCARR: It would have to be complete
8 within a matter of months.

9 THE COURT: How many months?

10 MR. KILCARR: I couldn't give you a ball park
11 on that. I could. Maybe four or five months. But if
12 they did not have it completed in whatever the period
13 that your Honor would be disposed towards, they could come
14 back to your Honor and render a status report as to
15 exactly where they were at that point in time.

16 THE COURT: I am alarmed by these figures of
17 eight and ten months that you are projecting on this case.
18 I don't know why cases should take that long. It is
19 almost like Jaundice against Jaundice, the Dickens case.
20 After three or five or six generations and 150 years, the
21 estate wound up with zilch. That is what I think is
22 happening here. Hundreds of thousands of dollars are going
23 to be spent and we are going to look back and say, Why?
24 I am alarmed by the length of time that is projected.

25 MR. KILCARR: This is an entirely gratuitous

comment, but I think appropriate in the circumstances of your Honor's remarks, and that is, in this advocate's personal judgment, doing the environmental work as you have prescribed now and not doing parallel prosecution work at the same time can have an entirely prophylactic effect on the time that is being talked about in this litigation. It can indeed state on the record, demonstrate to the prosecutors that some of their goals are excessive, some of their goals must be moderated in the light of environmental concerns; and if that is accomplished, and certainly that is the design of the statute, who is to say that the case may become a smaller case in the circumstances than the enormous one we are looking at now.

Your Honor, I have basically only one major point to make in support of our application for a temporary injunction, and that is the standards announced in Section 2202 of 28 USC, where the Congress has told the Courts that "following declaratory judgment further necessary or proper relief based upon the declaratory judgment may be granted after a reasonable notice and hearing against any adversary party whose rights have been determined by such judgment."

That is why we are here, your Honor. We are here because by the sheerest of coincidences when your order

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came out it was only days before today, and today, March 9, 1977, is the kickoff date for an entirely new phase of this Exxon case. Massive discovery. My client, Mobil Oil Corporation, happens to be in the dubious position of having been scheduled as the first company to commence compliance with that subpoena. We are talking, your Honor, literally, about tens of millions of dollars. We are talking about a discovery program that will involve by Commission counsel's own repeated representations over 700 depositions.

I suggest and plaintiff's respectfully suggest if that wave of discovery which is due to be launched today gets underway everything that you said in your opinion about the need for environmental considerations is going to drown and we won't see it again.

I am not suggesting that the Commission will not do what they are required to do, namely, prepare an impact statement, but I am suggesting that that exercise in the context of the discovery that we are looking at is going to be pro forma, non-essential, low priority work, and the very things that the courts, including your Honor have said about this congressional enactment, namely, decision makers have to be able to assess at every critical stage in a proceeding what are the environmental concerns, is simply

not going to happen.

Again, it is not criticism of the Federal Trade Commission. I respectfully suggest it is simple human nature. They have six million dollars which is going to be tied up in this discovery program. They are not going to have the time, the resource, nor indeed the inclination to do what you told them to do and what should be done immediately in the language of your order.

THE COURT: Well, I have sanctions if they don't submit a proper report, an impact statement.

MR. KILCARR: Indeed your do, your Honor.

THE COURT: Well, I will call to your attention that I use sanctions quite freely.

MR. KILCARR: I appreciate that, your Honor.

But I suggest at the time that you wrote your opinion, and when it issued last Tuesday night, the Court was not aware of the brink that the parties in Exxon literally were standing on at that particular point in time. That is what we are trying to convey to the Court in this application. That brink, that discovery program is why we are saying to the Court injunction now, temporary injunction now is necessary. We say further, your Honor, it is proper.

THE COURT: There is a request also for some

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2 limited protective order, isn't there, or is that another
3 case I am involved in?

4 MR. KILCARR: We are asking the Court to
5 retain jurisdiction.

6 THE COURT: Are there any documents you
7 want protected in any way?

8 MR. KILCARR: No, your Honor. That is not your
9 em. That is something else that is going on and is
10 identally coming to fruition this very day.

11 THE COURT: Are you saying that the
12 Administrative Judge has that?

13 MR. KILCARR: Yes, sir.

14 THE COURT: I am glad to hear it is not my
15 problem.

16 MR. KILCARR: That is not your problem.

17 The only other point I want to make under the
18 controlling statute, 28 USC 2202, is that in addition to
19 the temporary injunction being necessary, it would also be
20 quite proper in the words of the statute, and proper,
21 your Honor, because neither side before you today has any
22 difficulty in understanding the key holding that your Honor
23 made on March 1, and that holding was that the Federal
24 Trade Commission violated the law when they instituted the
25 Exxon case without having complied with Section 1022 (c)

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2 of NEPA. They violated the law, and that violation we
3 suggest, your Honor, infects the proceeding today.
4 It will continue to infect the proceeding, if you will
5 permit that metaphor, as long as the Government is allowed
6 to continue on its prosecutorial course without pulling
7 back and reorienting their priorities.

8 THE COURT: What do you contemplate is the
9 extent of the order, filing of the Impact Statement?

10 MR. KILCARR: It would go through that event,
11 the placing of the Impact Statement on the record in the
12 Exxon case and at the Federal Trade Commission. As I
13 suggested, they could come back to you earlier. They
14 could come back and give a status report, or whatever.
15 But the end event would be the filing and placing on the
16 record of the Impact Statement.

17 THE COURT: As I read your remarks, you are
18 satisfied that at some point in time they are going to
19 furnish an Impact Statement?

20 MR. KILCARR: They say as much, and I assume
21 they will do so.

22 THE COURT: If that is the case, whatever
23 length of time that takes will simply delay that case that
24 many more months or years, or whatever, if the discovery
25 doesn't start now?

2 MR. KILCARR: As your Honor recognizes and as
3 the courts have recognized, delay is inherent in situations
4 where the courts have had to tell government agencies like
5 the Federal Trade Commission: Yes, NEPA really applies to
6 your operations; and yes, you really do have to comply with
7 1022(c) of that Act.

8 As the D.C. Circuit said in the Jones v. D.C. :
9 Redevelopment Planning Agency case, delay is a concomitant
10 of the implementation of the procedures required by NEPA.
11 But in the context of this case, a point I was attempting
12 to make earlier, two considerations additionally apply
13 when one things about delay. It is delay that may well
14 have a prophylactic effect on this massive proceeding;
15 and secondly, in the context of a case that the Government
16 is on record as saying it will take multiple years to get
17 to trial, I respectfully suggest a delay of a matter of
18 months at this point given its probable beneficial effects
19 as an affirmative consideration rather than a negative one
20 when you look at the equation.

21 So, your Honor, what the plaintiffs would
22 respectfully request is that this temporary injunction does
23 issue and that it issue today, and that we get on with the
24 reordering of the priorities in the Exxon case and have
25 the Commission do that work and then return to their

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discovery.

Our final point, your Honor, is that in our considered judgment there will never come a time again when the environmental factor consideration which must take place in the Exxon case--there will never come another time when that can be considered as it should be, as the Congress mandates that it be if it doesn't take place now. If it is dropped into the wave of discovery that we are looking at, as I said earlier, we suspect that it will never accomplish anything more than pro forma work, busy work by people who are committed to prosecution goals, who won't have the time, the resources, the inclination to do what the Congress and what your Honor ordered them to do.

Thank you, your Honor.

MR. GERBER: Your Honor, my name is Nathaniel Gerber. I am an Assistant United States Attorney appearing in behalf of the Federal Trade Commission.

Plaintiff's application for post-judgment relief now before the Court is a relatively simple one, but one with significant and far-reaching--

THE COURT: Are you going to read from a statement, or are you going to make offhand remarks?

MR. GERBER: I am going to make offhand remarks.

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2 THE COURT: Then you don't mind if I interrupt
3 you from time to time?

4 Have you made a judgment as he seems to think
5 you have that there is not going to be an appeal in this
6 matter?

7 MR. GERBER: That is incorrect.

8 THE COURT: All I want is a yes or no. I
9 don't suggest that you should give up your right to appeal.

10 MR. GERBER: There is no indication whatsoever
11 in the last page of our brief that we were giving up our
12 right to appeal. The relief that plaintiffs seek right
13 now--and we are well aware that they do not seek a
14 preliminary injunction; they seek a temporary injunction
15 which is post-judgment relief. But the substance of that
16 relief is to ask this Court to intervene in an administrative
17 proceeding, not only to intervene but to bring it to an
18 absolute halt.

19 As we indicated in our brief, it is well settled
20 that a court will intervene in an administrative
21 proceeding only under extraordinary circumstances which
22 involve the threat of irreparable harm, so that while
23 in fact plaintiffs do not seek a preliminary injunction,
24 nonetheless they must make the same showing of irreparable
25 harm that must be made in the case of a preliminary

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injunction.

The issue in this application is not whether or not the Commission's ongoing divestiture proceeding is subject to NEPA. That has already been decided by this Court in favor of plaintiffs. In so finding, the Court has already given the plaintiffs appropriate relief, namely, that the Commission has been ordered to prepare an Environmental Impact Statement immediately.

THE COURT: Did I use that language?

MR. GERBER: Yes, you did, in the conclusion, your Honor.

I should note that in plaintiffs' original motion for summary judgment, which this Court granted, plaintiffs did not request injunctive relief, and this Court did not enjoin the divestiture proceeding pending preparation of the Impact Statement. Not only did they not request injunctive relief, they went one step further. There is a case that has been affirmed by the District of Columbia Court of Appeals, Gifford Hill, which reached the opposite conclusion.

I would just like to point out that in their brief plaintiffs distinguish Gifford Hill by stating in Gifford Hill they were seeking a preliminary injunction whereas there the plaintiffs weren't seeking a preliminary

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2 injunction. All they wanted was the adjudication that the
3 Commission's proceeding fell within the scope of NEPA, and
4 that an Environmental Impact Statement had to be prepared.
5 Now that they have gotten that they are right back to
6 Gifford Hill. It was a very wise move. Now that they
7 have gotten the declaratory judgment, they want the
8 injunction.

9 As I stated before, plaintiffs not only seek
10 to ask this Court to intervene in the Commission's
11 divestiture proceedings, they want to bring those
12 proceedings to an absolute halt even though plaintiffs
13 well know and, in fact, have conceded in their papers
14 that even the initial step in those proceedings, discovery,
15 just a gathering of documentary information, will take
16 years to conclude before the Administrative Law Judge
17 begins to adjudicate the Commission's charges.

18 THE COURT: Suppose I limited the injunction
19 to take up depositions and allow the discovery of documents
20 to go on; wouldn't that answer your problem? Couldn't you
21 get enough work in that area that would take as much time
22 as it would to make the Impact Statement?

23 MR. GERBER: I don't know how long it would take
24 to prepare an Impact Statement in this case. They usually
25 take months, often years. As Mr. Kilcarr has correctly

1
2 stated, this is a case of very large dimensions. Even
3 after the months or years that it took to prepare the --

4 THE COURT: My idea of the time limit is
5 six months, and I would have to be shown very persuasively
6 that you need more time than that before I would extend
7 it beyond that.

8 MR. GERBER: Your Honor's decision stated that
9 we should immediately begin preparing a draft. As your
10 Honor stated now, there would be six months to prepare a
11 draft?

12 THE COURT: Then I would like to fix a limit
13 after that. That wasn't the case of simply a draft. I
14 don't know why you would have to take that much longer
15 after the draft is prepared.

16 MR. GERBER: We do not believe that an injunction
17 is at all warranted here. First of all the very information,
18 the documentary information which the Commission now seeks
19 to obtain in furtherance of its divestiture proceedings
20 would be equally necessary in preparation of an
21 Environmental Impact Statement.

22 THE COURT: He seems to indicate that you can
23 get that from your agency and state agencies and not from
24 them.

25 MR. GERBER: My reading of plaintiffs' papers

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2 indicates that the information which is sought is
3 documentation of ownership of pipelines and refinery
4 operations. Mobil knows better than anybody what they own.
5 Mr. Pool, who is sitting next to me and is complaint
6 counsel for the Federal Trade Commission in this proceeding,
7 has indicated to me that in fact this information is in
8 the exclusive possession of Mobil.

9 THE COURT: That is almost completely
10 documentary, isn't it?

11 MR. GERBER: The documents that would be
12 disclosed are ultimately voluminous, although I should
13 say that plaintiffs really cannot claim any irreparable
14 injury such to justify bringing this on in two days. All
15 that was to be produced this morning was seven file drawers
16 of documents. That certainly does not constitute an
17 irreversible or irretrievable commitment of resources.

18 As I stated before, the Federal District Court
19 will not intervene in a pending administrative proceeding
20 except in extraordinary circumstances involving a clear show-
21 ing of irreparable harm.

22 As we explained in our brief, plaintiffs'
23 allegations of the prerequisite irreparable harm fall into
24 three categories: First, that the violation of NEPA that
25 this Court has found constitutes irreparable harm per se,

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and on that basis alone is sufficient to justify injunctive relief.

Second, the economic costs to plaintiffs of proceeding with discovery constitutes irreparable injury. We certainly did not mean to indicate in our brief that that was the only basis of irreparable injury that we saw in plaintiffs' papers. Any fair reading of Mr. Kilcarr's affidavit will indicate without any doubt that it certainly was an important claim, no less important than the first one I just mentioned.

Third, unless an Impact Statement is prepared immediately, its subsequent preparation would become a meaningless exercise.

If I may take a moment to comment on those three claims. The first that A NEPA violation constitutes irreparable harm as a matter of law has been categorically rejected by the Second Circuit on numerous occasions, most recently, less than a month ago, in State of New York versus Nuclear Regulatory Commission.

In that case the Government began preparing an Environmental Impact Statement regarding the safety implications of air transportation of radioactive nuclear materials. The Court of Appeals rejected the State's claim for injunctive relief pending the completion of the

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2 EIS on the ground that regardless of any violation of
3 NEPA which may have occurred, an injunction should be
4 issued only if the equities warranted it. So that their
5 claim that the violation constitutes irreparable harm as
6 a matter of law is simply not the law of this circuit. And
7 I should point out that plaintiffs have not cited a
8 single case in the support of this proposition in any
9 circuit in the Federal Court.

10 As to the second claim that plaintiffs will be
11 irreparably injured by the cost of proceeding with discovery,
12 or more properly beginning it, beginning the production of
13 documents, the law is again well settled that the expense
14 of an administrative proceeding does not of itself
15 constitute irreparable injury.

16 Again I would cite a recent Second Circuit
17 decision which says that in very clear language, Niagara
18 Mohawks Power Corporation versus Federal Power Commission.
19 More important, in the context of NEPA and in the context
20 of this case, the costs of plaintiffs proceeding with
21 discovery has no environmental consequences whatsoever.
22 This Court has found that the relief proposed by the
23 Commission's counsel is major federal action significantly
24 affecting the environment. But the costs to plaintiffs of
25 defending against the charge that they have violated the

cases in which injunctive relief was granted, and I quote: the "action sought to be enjoined necessarily" -- and the word "necessarily is underlined in the decision -- "would have caused immediate, demonstrable and irreparable damage to the environment."

Not only is there no showing of environmental injury resulting from production of documents, or even the taking of depositions, there is no environmental impact whatsoever that can be discerned.

Frankly, other than conclusory allegations relying on the language of Calvert Cliffs, there is no showing whatsoever in plaintiffs' papers of any environmental injury or impact resulting from the production of documents.

More important, and as the Second Circuit also noted, the purpose of enjoining an irreversible commitment of resources is to ensure that federal projects falling within the scope of NEPA might proceed only on the basis of a careful and informed decision-making process. The information which plaintiffs seek to withhold by this application is necessary to the divestiture proceeding. It is equally necessary to any meaningful Environmental Impact Statement that would be prepared by the Commission in response to your Honor's decision.

Accordingly, to grant plaintiffs' application

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1 with respect to either document discovery or depositions
2 would frustrate the very purpose of this Court's decision
3 which was, I respectfully submit, to compel preparation
4 of an Impact Statement in order to assure that the
5 adjudicatory proceeding of the Commission would proceed
6 only on the basis of a careful and informed decision-
7 making process.
8

9 Your Honor, we respect and appreciate plaintiffs'
10 concern with the environment. We submit, however, that
11 the underlying purpose of this action, both before as well
12 as now, is to impede and obstruct the Commission's
13 divestiture proceeding at every step of the game. And
14 we respectfully submit this Court not permit plaintiffs
15 to use the Court in that design.

16 Thank you.

17 THE COURT: What else can you ask him that
18 helps you in the Impact Statement?

19 What is the nature of the depositions that
20 you contemplate that you are going to have; seven hundred?
21 I am trying to find out what is the nature of the
22 depositions; what is the scope of those? What do you intend
23 to ask in effect, or don't you know?

24 MR. GERBER: I don't know. I would say that the
25 depositions would be significantly related to the information

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2 that is produced in the documentary discovery.

3 THE COURT: Never mind about three years from
4 now, but taking under consideration the present time now,
5 assume for the sake of argument that you can proceed on
6 the Impact Statement, what do you intend to ask him in the
7 area of the Impact Statement at this point in time? Suppose
8 their people come down tomorrow, you compel their
9 attendance, what are you going to ask him that helps you
10 in the Impact Statement and not in the prosecution? I am
11 trying to find out if you can distinguish between the two
12 of them.

13 MR. GERBER: I don't think that such a
14 distinction can be made before the information is
15 produced. It depends on what information can be
16 produced.

17 THE COURT: Let me put the question to you in
18 another way. Where do you say the Government can get the
19 information if they don't get it from you?

20 MR. KILCARR: Your Honor, there is a basic
21 total misconception at work here. The ownership of pipelines
22 and refineries is totally irrelevant to the Environmental
23 Impact Statement. The Environmental Impact Statement con-
24 cerns environmental factors: pollution, depletion of
25 natural resources. The Government needs not a lick of

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discovery from any respondent in the Exxon case to do the job mandated by the NEPA Act. That is absolutely erroneous, your Honor.

THE COURT: Well, you are both making conclusory statements. He is saying yes and you are saying no. Get down to specifics and tell me why not.

MR. KILCARR: Yes, your Honor.

The very basic question here is, if the Commission does what they are supposed to do under the Act, will there be a divestiture proceeding in the Exxon case? That is what the Court said and precisely correct. Will there be a divestiture proceeding? You start somewhere else to answer that question, not out of our records.

I respectfully suggest what the Government is espousing today is a make weight argument, and bound into that argument is let us continue with our discovery for purposes of our prosecutorial goals, and we will worry about divestiture and the Impact Statement as the documents come in. It is the cart before the horse.

That is why we are saying, as the courts have said, your Honor--and let me just read you one critical quote again in the Jones case:

"Thus the harm with which courts must be concerned in NEPA cases is not strictly speaking harm to

1
2 the environment but rather failure of decision makers to
3 take environmental factors into account in the way that
4 NEPA mandates."

5 Consequently, the Act doesn't provide for
6 discovery. The Act doesn't provide the Federal Power Com-
7 mission and the D. C. Land Development Agency with discovery
8 and subpoena authority. The Congress, and Senator Henry
9 Jackson, who is the principal promotor of this, never
10 provided for discovery. The discovery angle, your Honor,
11 constitutes another excuse. It is another potential loss
12 in the hallways of the bureaucracy of something that was
13 heralded in the halls of Congress. Discovery has no
14 relationship to the obligations that the Court has
15 correctly imposed upon the Federal Trade Commission.

16 I said earlier and I say again once the
17 environmental factors are integrated into the decision-
18 making process at the Federal Trade Commission now as
19 they should have been before they committed to divestiture,
20 once that happens, once there is a determination that the
21 environmental considerations can be accommodated coincidental
22 to the continuing prosecution of the alleged antitrust
23 violations, then certainly it would seem to me they could
24 proceed with discovery. But they are not going to find
25 out from my client or from the other seven oil companies

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what EPA has to say about refinery divestiture and pipeline divestiture. They are not going to find out from my client what the ICC has to say and what the Council on Environmental Quality has to say, and that is what they have to find out under the Act, not what my client owns or what refinery they might have to divest. That is totally irrelevant.

Let me go back to Gifford Hill, which gives me additional pleasure because your Honor faced Gifford Hill squarely. Gifford Hill holds that enforcement proceedings at the FTC were not major federal actions under NEPA. Your Honor said:

"To the extent that the above language of Gifford Hill is inconsistent with today's holding, the Court declines to follow it."

That is a fair answer to the argument that was raised by the U. S. Attorney.

In conclusion, there was not one mention, as I heard the Government's argument, about what we were asking the Court to do. There was not one mention about our principal reason for being here. It is, again, not because of the cost of the discovery that we are looking at, but rather if it is not enjoined now, if the environmental considerations aren't imputed into the decision-making

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2 process right now, we respectfully suggest it is never
3 going to happen. If it does happen, it will be pro forma
4 and it is not going to have the merit to make a difference
5 to answer that question will there be a divestiture
6 proceeding in this case.

7 Thank you.

8 MR. GERBER: Your Honor, if I may be heard.

9 This is not at all a case of the cart before
10 the horse. With all due respect, this is a change of
11 horses in midstream. In their original motion sor summary
12 judgment, plaintiffs devoted page after page of speculation
13 as to the terrible consequences in environmental impact
14 of divestiture. This Court, as I read the Court's decision,
15 accepted that argument. Now that we seek the information
16 of which they have exclusive possession regarding
17 divestiture, which was the very basis of their claim of
18 adverse environmental impact, they turn around and they say
19 that has no relationship whatsoever to the preparation of
20 a meaningful Environmental Impact Statement. Not only does
21 it have direct relationship to the preparation of a meaning-
22 ful Environmental Impact Statement, it is centrally
23 related to the Environmental Impact Statement which this
24 Court envisioned in its decision.

25 Your Honor had mentioned that possibly a draft

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2 of an Environmental Impact Statement could be prepared in
3 six months -- a "draft". Certainly the Government would
4 make every conceivable effort to comply with this
5 Court's decision. Let me point out the many stages
6 that are involved in the preparation of an Environmental
7 Impact Statement prior to filing.

8 First, there is circulation in the public for
9 comment. Hearings are held. Then it goes to the EPA,
10 then to the Council on Environmental Quality, and then
11 to the President of the United States. And then after it
12 is filed, the plaintiffs will be right back in this court
13 several years down the road before your Honor, because
14 they have asked this Court to retain jurisdiction,
15 litigating the adequacy of the Environmental Impact
16 Statement. So that is an additional several years.

17 We submit that there is a dual public interest
18 to be served here. Your Honor has found that NEPA applies
19 and that, therefore, the public interest requires the
20 preparation of an Environmental Impact Statement. Surely
21 no one would dispute that the public interest requires
22 that the Federal Trade Commission be permitted to proceed
23 with its divestiture proceedings against these plaintiffs.
24 The public interest can be served on both sides by
25 permitting the Commission to proceed with its divestiture

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proceeding, and at the same time pending, of course, any appeal or request for a stay pending appeal, the Commission would go forward and prepare an Environmental Impact Statement as mandated by this Court.

We submit, your Honor, that the stands taken now before the Court by these plaintiffs indicate, contrary to Mr. Kilcarr's assertions, that we don't say what their purpose is in being here. We do say over and over again what their purpose is, and it is very clear. They want to obstruct and impede the divestiture proceedings against these plaintiffs at every step of the way. Having ascended one step of the ladder, they now seek to go to the top by asking this Court to join with them and obstruct that divestiture proceeding and call it to a halt.

We submit that the plaintiffs have the burden of demonstrating irreparable harm. They have demonstrated none whatsoever. And for that reason, this application should be denied in all respects.

THE COURT: All right, thank you, gentlemen. I will reserve decision.

Can you agree between yourselves to put over these depositions until I get a chance to think about it?

MR. KILCARR: May we have a moment of your Honor's time.

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THE COURT: Go ahead.

MR. KILCARR: Your Honor, would you hear us off the record?

(Discussion off the record.)

(In the robing room.)

THE COURT: While the decision is being reserved by the Court, the parties have agreed between themselves -- and they are all present here in the robing room -- that as far as the production of documents is concerned, nothing will be done until the Court's decision which is contemplated to be on Monday.

If the Court orders that the proceedings continue and that documents be produced, then there will be immediate compliance with the Court's order on Tuesday. On the other hand, if the Court says that it is not necessary, then that will be the end of that.

MR. PUGH: I represent Shell Oil Company. We are not scheduled to produce until April 26.

MR. KILCARR: We are talking about Mobil Oil Corporation.

MR. GERBER: We are talking about those people who were to begin producing today.

MR. KILCARR: That is Mobil Oil Corporation. Thank you very much.

THE COURT: Thank you.

5-2014

MEMORANDUM

-against-

75 Civ. 2748
(JMC)

Defendants.

CANNELLA, D.J.:

MAR 15 1977

On March 2, 1977 this Court ordered the FTC immediately to begin preparation of a draft environmental impact statement ("EIS") exploring the environmental ramifications of the relief contemplated in Exxon. See § 102(2)(C) of the National Environmental Policy Act ("NEPA"),

42 U.S.C. § 4332(2)(C). The order did not enjoin the administrative proceedings pending compliance with the impact statement process; nor had the plaintiffs requested this either in the initial pleadings or any time thereafter. Five days later the plaintiffs moved by way of order to show cause for this relief. Specifically, Mobil Oil Corp. hopes to stay enforcement of subpoenas duces tecum, originally issued in November of 1976, returnable beginning March 9, 1977^{1/} and extending into April.^{2/}

Plaintiffs claim that, if discovery in Exxon is not enjoined while the FTC complies with this Court's order of March 2, the completed EIS will be no more "than an after-the-fact acknowledgment of the environmental consequences that will flow from agency action." Mobil Oil Corp. v. FTC, No. 75 Civ. 2748, at 19 (S.D.N.Y. March 2, 1977). This Court believes instead that meaningful and productive consideration of the environmental consequences may be achieved by the less drastic remedy of ordering the

^{1/} The FTC has agreed to adjourn this date pending the Court's decision.

^{2/} Subpoenas have been issued to all the Exxon respondents. Documents from the other companies will be due in the coming weeks.

Commission to prepare and distribute a draft EIS within the next six months, and therefore denies the instant motion.

In New York v. Nuclear Regulatory Comm'n, the Second Circuit reaffirmed an earlier holding concerning the enjoining of federal actions that violate NEPA:

Although the procedural requirements of NEPA must be followed scrupulously and cost or delay will not alone justify noncompliance with the Act, where the equities require it, it remains within the sound discretion of a district court to deny an injunction, even where deviations from prescribed NEPA procedures have occurred.

Nos. 75-6115, 76-6022, 76-6081, at 6192 (2d Cir. Feb. 14, 1977), quoting Conservation Soc'y of S. Vt., Inc. v. Sec'y of Transp., 508 F.2d 927, 933-34 (2d Cir. 1974) (footnotes omitted), vacated on other grounds and remanded, 423 U.S. 809 (1975). In so doing, the court distinguished cases in which injunctive relief was granted based upon the fact that in such cases "the action[s] sought to be enjoined would have produced an irreversible and irretrievable commitment of resources," slip op. at 6192, and "necessarily would have caused immediate, demonstrable and irreparable damage to the environment," slip op. at 6193 (emphasis by the court), citing EDF v. TVA, 468 F.2d 1164, 1184 (6th Cir.

1972); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972); Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971).

The situation presented herein does not meet the above criteria. Certainly, the oil companies' production of documents, no matter how voluminous, does not irreversibly and irretrievably commit the FTC's resources such that the contemporaneous or even subsequent preparation of an EIS would be a meaningless exercise. The present stage of discovery is but a small part of the proceedings constituting this massive administrative action. Plaintiffs also point to the Commission's intention to depose approximately seven hundred persons, but the taking of these depositions is not scheduled to begin for about three years--well after the impact statement requirements will have been satisfied. Regarding the second criterion, compliance with the outstanding subpoenas will neither immediately, demonstrably nor irreparably damage the environment.

Plaintiffs argue that, based upon the completed impact statement, the FTC may limit the scope of the administrative proceeding and thus decrease the amount of discovery necessary. While the Court agrees that this is a possibility, it believes this benefit will be accomplished

by ensuring that preparation of an EIS be a top priority for the FTC, without having to call a halt to the present stage of discovery. Moreover, the Government states, and it may well be, that the information sought in the adjudicatory proceeding will also aid in the Commission's preparation of a draft EIS.

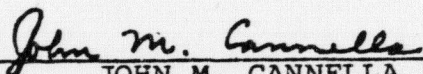
In its March 2 opinion, this Court held that the oil companies have standing to represent the public interest in preserving our environment. It would be naive, however, to lose sight of plaintiffs' interest in delaying the FTC's action for as long as possible. In that Exxon will not be ready for trial for a number of years, the Court is disinclined to reduce the already slow pace at which it is proceeding by enjoining discovery pending the Commission's filing of an EIS.

Consequently, plaintiffs' motion to stay the administrative proceedings pending the FTC's compliance with this Court's order of March 2, is denied. The FTC is ordered to prepare and distribute a draft EIS by September 12, 1977 and to submit a report on the Commission's progress in preparing the draft on July 11, 1977, or any time sooner. The Court expects

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that the various agencies to which the draft EIS is submitted will recognize the priority of this matter and act accordingly.

SO ORDERED.



JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
March 14, 1977.

MR. *Heber*

75-2014

77-1390

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed
4/25/77

----- x
MOBIL OIL CORPORATION, GULF OIL :
CORPORATION, SHELL OIL COMPANY AND :
STANDARD OIL COMPANY OF CALIFORNIA, :

Plaintiffs, :

- against - :

NOTICE OF APPEAL

FEDERAL TRADE COMMISSION; AND : 75 Civ. 2748
LEWIS A. ENGMAN, Chairman, : (JMC)
PAUL RAND DIXON, Member, :
MARY ELIZABETH HANFORD, Member :
STEPHEN NYE, Member, and MAYO J. :
THOMPSON, Member and CHARLES A. TOBIN, :
Secretary; as officers of the :
FEDERAL TRADE COMMISSION, :

Defendants. :

----- x
S I R S :

PLEASE TAKE NOTICE that the defendants hereby
appeal to the United States Court of Appeals for the Second
Circuit from the Opinion and Order (# 45,651) of the United
States District Court for the Southern District of New York
(Honorable John M. Cannella) dated March 1, 1977, and filed
with the District Court on March 2, 1977, and the supplemental
Memorandum Decision and Order of said Court dated March 14,
1977, and filed with the District Court on March 14, 1977.

Dated: New York, New York

April 25, 1977

Yours, etc.,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: *1*

NATHANIEL L. GERBER
Assistant United States Attorney
Office & Post Office Address
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1946

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NLG:mb
4-2313

TO: DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10048

United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

MR. Gerber

NLG:mb
4-2313

75 2014

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
MOBIL OIL CORPORATION, GULF OIL :
CORPORATION, SHELL OIL COMPANY AND :
STANDARD OIL COMPANY OF CALIFORNIA, :

Plaintiffs, :

- against -

FEDERAL TRADE COMMISSION; AND :
LEWIS A. ENGMAN, Chairman, :
PAUL RAND DIXON, Member, :
MARY ELIZABETH HANFORD, Member :
STEPHEN NYE, Member, and MAYO J. :
THOMPSON, Member and CHARLES A. TOBIN, :
Secretary; as officers of the :
FEDERAL TRADE COMMISSION, :

Defendants. :

4-26-77
ORDER TO SHOW
CAUSE

75 Civ. 2748
(JMC)

----- x
This Court having rendered an opinion and order on March 2, 1977, and a supplemental memorandum decision and order on March 14, 1977, in the above-captioned action granting plaintiffs' motion for summary judgment and directing defendants to prepare a draft Environmental Impact Statement ("EIS") pursuant to Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) by September 11, 1977.

NOW, on the motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the defendants herein, and upon the annexed affidavits of Nathaniel L. Gerber, Roger B. Pool and John F. Dugan, together with the exhibits annexed thereto, and there appearing good cause therefore, it is hereby,

ORDERED that the plaintiffs shall show cause, if there be any, before this Court at 10:00 _____ A.M., on April 29, 1977, in Room 1025, United States Courthouse, Foley Square, New York, New York why an order should not be entered pursuant to Rule 62 of the Federal Rules of Civil

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Procedure staying the order of this Court entered March 2, 1977, and the supplemental order entered March 14, 1977, insofar as said order directed the defendants to prepare a draft EIS by September 11, 1977, pending appeal thereof to the United States Court of Appeals for the Second Circuit; and it is further

ORDERED that service of this order together with the annexed documents shall be sufficient if a copy thereof is delivered to a person of suitable age and discretion at the offices of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, New York 10048, lead counsel for plaintiffs herein, no later than 4:00 P.M. on April 26, 1977.

Dated: New York, New York

April 25, 1977

/s/ JOHN M. CANNELLA
UNITED STATES DISTRICT JUDGE

E.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MOBIL OIL CORPORATION, GULF :
OIL CORPORATION, SHELL OIL :
COMPANY AND STANDARD OIL :
COMPANY OF CALIFORNIA, :

Plaintiffs, :

-v- :

FEDERAL TRADE COMMISSION; AND :
LEWIS A. ENGMAN, Chairman, :
PAUL RAND DIXON, Member, :
MARY ELIZABETH HANFORD, Member :
STEPHEN NYE, Member, and :
MAYO J. THOMPSON, Member and :
CHARLES A. TOBIN Secretary; :
as officers of the FEDERAL :
TRADE COMMISSION, :

Defendants. :

AFFIDAVIT

75 Civ. 2748 (JMC)

-----x
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

NATHANIEL L. GERBER, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in
the office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, attorney for
defendants herein, and in that capacity I am responsible for
the defense of this action.

2. I submit this affidavit in support of the
instant motion by order to show cause for a stay pending
appeal of this Court's: (1) Opinion and Order filed March 2,
1977, and (2) supplemental Memorandum Decision and Order
filed March 14, 1977, insofar as said Decision and Order
directed defendants to prepare a draft Environmental Impact

Statement pursuant to Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. §4332(2)(C), on or before September 12, 1977.

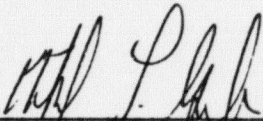
3. In further support of this application, defendants have submitted the affidavits of Roger B. Pool, an attorney employed by the defendant Federal Trade Commission whose responsibilities include the prosecution of the Commission's adjudicatory proceeding known as In The Matter of Exxon Corporation, et al. (Docket No. 8934) and of John F. Dugan, Acting Secretary of the Federal Trade Commission.

4. On April 25, 1977, defendants filed with the District Court a Notice of Appeal from the aforementioned orders. A copy of said Notice is annexed hereto as Exhibit "A".

5. Defendants seek to proceed by order to show cause rather than by notice of motion because of the immediate threat of irreparable injury to the defendants as set forth in the annexed affidavit of Roger B. Pool.

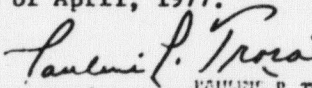
6. No previous application has been made for the relief sought herein.

WHEREFORE, it is respectfully requested that the annexed order to show cause be signed and that the defendants' motion for a stay pending appeal be granted.


NATHANIEL L. GERBER
Assistant United States Attorney

Sworn to before me this

25th day of April, 1977.


LAURENCE P. TROIA
NOTARY PUBLIC, State of New York
No. 314932381
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

MOBIL OIL CORPORATION, GULF OIL :
CORPORATION, SHELL OIL COMPANY AND :
STANDARD OIL COMPANY OF CALIFORNIA, :

Plaintiffs, :

- against - : NOTICE OF APPEAL

FEDERAL TRADE COMMISSION; AND : 75 Civ. 2748
LEWIS A. ENGMAN, Chairman, : (JMC)
PAUL RAND DIXON, Member, :
MARY ELIZABETH HANFORD, Member :
STEPHEN NYE, Member, and MAYO J. :
THOMPSON, Member and CHARLES A. TOBIN, :
Secretary's officers of the :
FEDERAL TRADE COMMISSION, :

Defendants. :

----- x

S I R S :

PLEASE TAKE NOTICE that the defendants hereby
appeal to the United States Court of Appeals for the Second
Circuit from the Opinion and Order (# 45,651) of the United
States District Court for the Southern District of New York
(Honorable John M. Cannella) dated March 1, 1977, and filed
with the District Court on March 2, 1977, and the supplemental
Memorandum Decision and Order of said Court dated March 14,
1977, and filed with the District Court on March 14, 1977.

Dated: New York, New York

April 25, 1977

Yours, etc.,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: NATHANIEL L. GERBER
Assistant United States Attorney
Office & Post Office Address
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1946

EXHIBIT "A"

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TO: DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10048

United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MOBIL OIL CORPORATION, GULF :
OIL CORPORATION, SHELL OIL COM- :
PANY AND STANDARD OIL COMPANY :
OF CALIFORNIA, :

Plaintiffs, :

- against - :

AFFIDAVIT

FEDERAL TRADE COMMISSION; AND :
LEWIS A. ENGMAN, Chairman, :
PAUL RAND DIXON, Member, :
MARY ELIZABETH HANFORD, Member :
STEPHEN NYE, Member, and MAYO J. :
THOMPSON, Member and CHARLES A. :
TOBIN Secretary; as officers of :
the FEDERAL TRADE COMMISSION, :

75 Civ. 2748 (JMC)

Defendants. :

-----x
District of Columbia) : ss.:
City of Washington)

ROGER B. POOL, being duly sworn, deposes and says:

1. I am an attorney employed by the Federal Trade Commission ("Commission") and the chief complaint counsel in the Commission case known as In The Matter of Exxon Corporation, et al. (Docket No. 8934--hereinafter "Exxon"). I am familiar with the facts and proceedings described herein and I submit this affidavit in support of the defendants' application for a stay pending appeal of the orders of this Court in the above matter dated March 2, 1977, and March 14, 1977.

2. Exxon was commenced July 18, 1973, with the issuance of a complaint by the Commission, Exhibit "A" attached hereto, which charged plaintiffs and four other major oil companies with violations of Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45. Section 5 authorizes the Commission to issue a complaint

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when it has "reason to believe" that a violation of law has occurred and that issuance of the complaint would be in the public interest. The complaint issued in Exxon charges respondents, including plaintiffs in this action, with combining or agreeing to monopolize the refining of crude oil into petroleum products, maintaining monopoly power over the refining of crude oil into petroleum products, and restraining trade and maintaining a non-competitive market structure in the refining of crude oil into petroleum products, all in violation of Section 5(a)(1) of the FTCA, 15 U.S.C. § 45(a)(1).

3. Plaintiffs instituted the instant action on June 6, 1975, seeking a declaratory judgment that Exxon was "a major federal action significantly affecting the quality of the human environment" within the meaning of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., such as would mandate the preparation of an Environmental Impact Statement ("EIS") pursuant to Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C). In response to cross motions for summary judgment, on March 2, 1977, this Court issued a decision holding that "since the relief proposed in Exxon would operate 'to restructure the petroleum industry and alter the manner in which oil, a depletable natural resource, is produced, distributed, and used,' ... Exxon is a 'major federal action significantly affecting the quality of the human environment ...'" (Slip Op. at 41; footnotes omitted.) The Court directed the Commission to begin immediately the preparation of a draft EIS. Shortly thereafter, plaintiffs brought a supplemental application

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seeking to enjoin any further action by the Commission in Exxon pending the completion and filing of the aforementioned EIS. On March 14, 1977, this Court issued a memorandum decision wherein it denied plaintiffs' application on the ground that no irreparable injury would flow to the environment through the continuation of Exxon simultaneously with the preparation of an EIS. However, the Court directed the Commission to complete a draft EIS by September 12, 1977, and to submit a status report of compliance by July 11, 1977.

4. Among the criteria for determining whether a stay pending appeal should be granted are the likelihood that the appeal will succeed on the merits and the extent of the injury that would flow to the public as a result of compliance with this Court's decisions pending the Commission's appeal thereof. In Parts I and II of this affidavit, I will demonstrate: (I) The strong likelihood of success on the merits through an explanation of Exxon, specifically that the Commission has not yet proposed any federal action; and (II) The nature of Exxon is such that no federal action in the nature of relief will be proposed within the meaning of NEPA until the completion of discovery and the adjudication of whether plaintiffs, respondents therein, have in fact violated the FTCA as presently charged. In Part III of this affidavit I will show the irreparable injury that would flow to the Commission and the public from this Court's decisions of March 2, 1977, which imposed the requirement of an EIS, and March 14, 1977, which established a stringent time framework within which a draft EIS must be prepared.

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I. THE NATURE AND SCOPE OF EXXON
AND THE ABSENCE OF ANY PROPOSAL
FOR RELIEF

5. Rule 3.11 of the Commission's Rules of Practice, 16 C.F.R. § 3.11(b)(3), provides that upon the issuance of a complaint by the Commission, it shall contain "[w]here practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint...." (Emphasis added). Although, pursuant to this Rule, the Commission has usually included a proposal for relief in its complaints, it departed from this practice in the Exxon complaint and did not include any proposal of substantive relief. Instead, the Commission chose to postpone any such proposal by appending to the complaint the following "Notice of Contemplated Relief":

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anticompetitive practices engaged in by the respondents and to restore competition in the relevant market or markets.

6. It is clear from the Commission's notice that it had determined that relief would not be proposed unless and until respondents were found to have violated the relevant sections of the FTCA. Other than this notice of contemplated relief, the Commission has not issued any statement or taken any position with respect to relief in Exxon.

7. In its decision of March 2, 1977, the Court placed great emphasis upon the environmental consequences

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that would flow from "the relief proposed in Exxon." As shown above no relief has ever been proposed by the Commission in Exxon. The relief which the Court apparently thought had been proposed by the Commission had in fact been tentatively suggested by complaint counsel during the course of preliminary proceedings before the administrative law judge. The circumstances surrounding the making of this proposal and the absence of any approval or endorsement thereof by the Commission are explained in the remaining paragraphs of Part I of this affidavit.

8. As is mandated by Rule 3.42 of the Commission's Rules of Practice, 16 C.F.R. § 3.42, Exxon is currently pending before an administrative law judge who has responsibility, in the first instance, for deciding all motions, ruling on all discovery requests, conducting the trial, and issuing an initial decision.

9. Complaint counsel are members of the Commission staff responsible for prosecuting the Commission's complaint during discovery as well as trial before the administrative law judge. The members of the Commission, as distinct from complaint counsel, have no role in the prosecution of the complaint and function as an appellate tribunal. In furtherance of this distinction, Rule 4.7 of the Commission's Rules of Practice, 16 C.F.R. § 4.7, prohibits all ex parte communications concerning the merits of a proceeding such as Exxon or any factually related proceeding between the Commission, or the administrative law judge, and any person performing an investigative or prosecutorial function in connection therewith.

10. On February 22, 1974, complaint counsel were required by the presiding administrative law judge to state their intentions as to the then contemplated relief. Complaint counsel submitted their preliminary proposals as to the relief that they would request in the event that a violation were found to have occurred. A copy of these proposals is annexed hereto as Exhibit "B". Complaint counsel stated that proposed remedies submitted at that time were only "on the basis of current information," and that "[t]he appropriateness of these remedies of course will be determined on the basis of a full litigative hearing before the administrative law judge. It may be that, on the basis of such hearings, the proposed relief may be modified." (Exhibit B, p. 138). No such hearings have yet taken place.

11. The relief proposals tentatively suggested by complaint counsel on February 22, 1974, were not approved, endorsed or commented upon by the Commission prior to their submission to the administrative law judge; the Commission has not approved, endorsed or commented upon any element of these suggested relief proposals at any time since their submission.

12. Complaint counsel's tentative relief proposals are of no significance in the context of NEPA since they are at least three steps removed from a proposal of relief by the Commission. After the completion of discovery and trial, complaint counsel will formulate their final recommended relief proposals; thereafter the administrative law judge will make the initial decision as to whether the alleged violations of the FTCA have been proved and, if so, what relief, if any, should be ordered. Once the adminis-

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trative law judge issues his initial decision, the losing side can appeal that decision to the Commission. The Commission has authority to make a de novo determination of whether there has been a violation of the FTCA and, if so, what might constitute an appropriate remedy. The administrative law judge's findings of fact, determinations of violations of the anti-trust laws, and proposed orders of relief are not binding on the Commission. See 16 C.F.R. §§3.52 -3.54.

13. Only the Commission can issue a binding order -- subject to judicial review -- imposing relief in Exxon. It may adopt the relief proposed by the administrative law judge, if any, or, based upon its de novo review may order remedies different from or in addition to those initially prescribed. It is not unusual for the Commission's final order of relief to differ substantially from that recommended by complaint counsel or from that ordered by the administrative law judge. See, e.g., FTC v. National Lead Co., 352 U.S. 419, 427-428 (1957); National Dynamics Corp. v. FTC, 492 F.2d 1333, 1336 (2d Cir. 1974) cert. denied, 419 U.S. 993 (1974); National Commission On Egg Nutrition, FTC Dkt. 8987 (July 20, 1976). On occasion, the FTC has determined that a violation of the law has occurred, but ordered no affirmative relief. See, e.g., Litton Industries, 85 F.T.C. 333 (1975).

14. As of the present, there has not been any proposal of relief in Exxon other than that tentatively set forth by complaint counsel which, as shown above, is neither binding upon the Commission nor necessarily reflective of its views. Accordingly, there has been no proposal by the Commission of federal action and, as stated in the accompanying affidavit of John F. Dugan, Acting Secretary of

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the Commission, there will be no occasion for the Commission to make any proposals for relief until the matter returns to the Commission on appeal from an initial decision of the administrative law judge.

II THE NATURE OF EXXON EFFECTIVELY
PRECLUDES THE PREPARATION OF AN
EIS UNTIL THE COMMISSION ADJUDI-
CATES THE MERITS OF THE COMPLAINT
AND, IF A VIOLATION IS FOUND,
PROPOSES APPROPRIATE RELIEF

15. Complaint counsel currently are involved in discovery in Exxon. This discovery is to obtain information relevant to (1) whether there have been violations as alleged in the complaint, and (2) if violations are established, what might constitute appropriate remedies.

16. Complaint counsel will require a lengthy period of major discovery prior to trial. Only one administrative respondent--Gulf Oil Corporation--provided any information to the Commission during the investigation preceding issuance of the complaint. The information provided by Gulf pertained only to a narrow range of relevant topics and provided only limited information even as to these topics. As a result complaint counsel need substantial document and deposition discovery of respondents, as well as third parties, prior to trial. Aside from this limited production by Gulf, no document production by any respondent occurred until March 15, 1977.

17. Respondents have also stated that they will need substantial additional discovery before they are prepared to go to trial. Some or all of this discovery may occur after the completion of complaint counsel's discovery or after complaint counsel's presentation of their case-in-chief.

18. Complaint counsel have proposed that they be allowed multiple stages of pre-trial discovery. The present stage consists of subpoenas duces tecum to respondents. The second stage would consist of subpoenas ad testificandum to respondents. The third stage would consist of subpoenas duces tecum and subpoenas ad testificandum to third parties.

19. The administrative law judge issued the first subpoenas duces tecum to the respondents on November 24, 1976 (January 17, 1977 for Mobil Oil Corporation). The documents to be produced pursuant to those subpoenas consist of only preliminary identification and organizational materials and documents previously supplied to other government agencies. Although the subpoenas had a return date of January 24, 1977, which was stayed until February 3, 1977, some respondents have advised complaint counsel and the administrative law judge that they will not begin producing any documents until April or May, 1977.

20. At the same time that complaint counsel requested the production of documents covered by the subpoenas issued on November 24, 1976, complaint counsel also requested the production of large quantities of substantive materials relevant to the issues in the Exxon complaint. The administrative law judge denied those requests without prejudice to their being resubmitted in a narrower, less burdensome form. Complaint counsel have appealed this denial to the Commission.

21. Discovery proceedings in Exxon have been subject to numerous lengthy delays. Respondents have opposed nearly every one of the document specifications contained in the subpoena issued by the administrative law

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judge on November 24, 1976. Although the return date of this subpoena was originally set for January 24, 1977, no respondent produced any documents until March 15, 1977, nearly four months after the subpoena was issued. At least one respondent has informed complaint counsel that production may not be complete until June or July, 1977. In addition, five of the eight respondents have refused to provide "confidential" documents required by the November 24 subpoenas until they receive a protective order from a federal court more restrictive than that issued by the Commission. A sixth respondent has declined to produce any documents pursuant to the subpoenas. As a result, the administrative law judge has had to submit to the Commission a request by complaint counsel that the Commission initiate a judicial enforcement proceeding to obtain the withheld materials.

22. Complaint counsel presently anticipate that document discovery will be completed within eighteen months; that thereafter essential depositions of approximately 500-700 of respondents' past and present employees would require an additional twelve months of discovery. Respondents have disputed these projections as being unreasonably short. Based upon these estimates, the administrative law judge has stated his projection that Exxon will not be ready for trial for approximately 5 years. This projection is predicated upon the "most favorable of circumstances" and specifically assumes that complaint counsel will not need judicial enforcement of any of their subpoenas. If respondents persist in their practice of resisting compliance with Commission subpoenas, the "favorable circumstances" upon which the administrative law judge premised his 5 year projection will not obtain.

23. The discovery planned by complaint counsel is critical to the development of any subsequent relief pro-

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posals. The February, 1976, substantive subpoena application presently on appeal to the Commission contains requests for information about each of respondents' acts and practices and elements of their structure that were the target of complaint counsel's earlier relief proposals. Materials responsive to these and subsequent discovery requests will be utilized by complaint counsel for the purpose of developing their ultimate relief proposals and are also likely to be relevant to the Commission should it find a violation and formulate a remedy.

24. Some of the information sought to be obtained through discovery in Exxon would also be relevant to the preparation of an EIS. For example, complaint counsel are presently seeking to discover A) The identities of the various crude oil production, refining, and finished petroleum products marketing companies owned by respondents; B) The various types and qualities of crude oil processed in respondents' refineries; C) The various types and qualities of finished product produced in the refineries including, where relevant, its sulphur content; D) The extent of respondents' ownership of crude oil and finished product pipelines; E) The nature and quantity of finished product transported through respondents' pipelines; and F) The nature and extent of respondents' participation in the offshore production of crude oil. Much of this information, relevant to formulating specific proposals of relief, is equally relevant to an analysis of the potential environmental impact of such relief if it is ordered. Respondents are the only source of this information accessible to the Commission.

25. Respondents have vigorously asserted that any relief in Exxon must take into account changes in the industry since the issuance of the complaint in 1973 and that any relief must be founded, if at all, on present

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conditions in the industry or conditions existing when relief would be imposed. To that end, they have filed with the administrative law judge numerous pleadings alleging that "dramatic" changes have occurred in the domestic and international petroleum industry since issuance of the complaint. They have referred to the elimination for plaintiffs of the oil depletion allowance, the regulation of the petroleum industry by the Federal Energy Administration, the nationalization of respondents' interests in foreign petroleum producing properties, the termination of state imposed oil production restrictions in the United States, and this country's increased dependence on foreign crude oil supplies. Respondents have contended that these changes have been so substantial that the allegations in the complaint and complaint counsel's original relief proposals are outdated and should be reviewed and revised.

26. The initial relief proposals tentatively suggested by complaint counsel on February 22, 1974, were based on information then available, as to the nature and extent of respondents' alleged violations of the law, and the appropriateness of relief in view of those violations. Complaint counsel will evaluate all information obtained during discovery and presented at trial before presenting final relief proposals. These proposals will take into account, inter alia, changes that may have occurred in the industry between the issuance of the complaint in 1973 and the date when final relief proposals are to be presented. These proposals would reflect, inter alia, changes in government policy, changes in the administrative respondents' operations since the initiation of the proceeding, changes in competitive conditions in the industry, changes in international activities affecting the petroleum industry,

technological development, and changes in consumption patterns. Based upon the relevant information to be obtained during discovery and trial, the relief that ultimately will be recommended by complaint counsel and thereafter which may be proposed by the Commission may well differ substantially from that tentatively offered on February 22, 1974.

27. The environmental consequences of any relief that might be proposed by the Commission in the event of an adjudication adverse to respondents cannot be analysed unless and until the proposals of relief are themselves formulated. As shown above, final recommendations of proposed relief by complaint counsel cannot be made until the completion of discovery and trial. Only then will the information necessary to the formulation of relief proposals and, a fortiori, to an analysis of the potential environmental impact of such proposals, have been gathered. Even that stage, which will not be reached for at least five years, would be premature for the preparation of a EIS since no proposal of relief will have yet been made by the Commission.

28. Complaint counsel's tentative recommendation of contemplated relief (Exhibit "B") does not contain specific proposals of relief but only a general statement of complaint counsel's goals in the prosecution of Exxon--goals that will be refined to specific proposals only as Exxon proceeds through discovery and adjudication. The only statement of any specificity in the recommendation is complaint counsel's statement that respondents should divest themselves of 40 to 60 percent of their refinery capacity and that ten to thirteen new refining companies should be established. However, complaint counsel has not proposed the specific means or actions by which this goal should be accomplished. Accordingly, there is no proposal of specific action the alternatives to which might be considered in an EIS.

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III. COMMENCEMENT OF PREPARATION OF THE
EIS PENDING APPEAL WOULD IRREPARABLY
IMPEDE THE TIMELY PROSECUTION OF
EXXON AND WOULD PRECLUDE THE COM-
MISSION'S FULFILLMENT OF ITS STATUTORY
RESPONSIBILITIES

29. As is detailed in the following paragraphs, complaint counsel are prosecuting Exxon, within the framework of a fixed fiscal and manpower budget for the fiscal year ending September 30, 1977. The commencement, pending appeal, of the preparation of a draft EIS would in all likelihood necessitate the diversion of funds and manpower to such an extent that complaint counsel's ability to continue the prosecution of Exxon would be severely curtailed. Given the public interest in a timely determination of whether respondents have in fact committed the unlawful acts charged in the Exxon complaint, the aforementioned diversion of resources should not be compelled until after the appeal herein has been taken and a final appellate decision rendered. In the event that the decision of the District Court is reversed or otherwise nullified, the intervening commitment of resources necessary for compliance with the present orders could not be recouped. If, however, the decision is affirmed, sufficient time for the preparation of a draft EIS even before the completion of discovery in Exxon will remain, as is demonstrated in Part II of this affidavit.

30. To my knowledge, no employee of the Bureau of Competition, which is responsible for the prosecution of Exxon and all the Commission's antitrust actions, has any experience or background in preparing an EIS. Moreover, the Commission has never prepared an EIS in conjunction with an adjudicative proceeding. The Commission has prepared only one draft EIS since the passage of NEPA in 1969, and that was with regard to promulgation of a Commission Rule requiring the posting of octane levels on pumps dispensing gasoline.

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This EIS was prepared by persons either no longer employed by the Commission or working within the Bureau of Consumer Protection, which regulates advertising, and is not involved in antitrust enforcement. In view of the difference between the functions of the two Bureaus, and the fact that the draft EIS prepared by Bureau of Consumer Protection dealt with the posting of gasoline octane ratings and Exxon focuses largely on the production and transportation of crude oil and its refining into petroleum products, it is most unlikely that any expertise developed for the octane EIS will be of use in the preparation of an EIS in Exxon.

31. Preparation of the Court mandated EIS would immediately necessitate the diversion of many attorneys research assistants, economists and clerical staff away from prosecution of Exxon. Because of the complexity of the oil industry, the multiplicity of and interconnection of remedial alternatives conceivable within the tentative and non-specific suggestion of possible relief made in 1974, and the innumerable and almost imponderable variety of possible environmental consequences of such alternatives, complaint counsel cannot determine at this time the number of Commission employees who would actually be required in the preparation of the EIS. Nonetheless, if complaint counsel are compelled to consider each of the major varieties of possible alternative remedies that might be ordered in this proceeding, it is my best estimate that as much as two thirds of the staff currently assigned to Exxon would be diverted from their assigned responsibilities.

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32. A complete listing or identification of the alternatives that might be relevant to an EIS in Exxon, even one predicated upon complaint counsel's recommendations of February 22, 1974, is not now possible in my opinion, in part because of the lack of sufficient specificity about clearly defined alternatives to provide a basis for an EIS. For example, respondents have approximately thirty-four refineries in the relevant geographic market. As to each of these refineries whose divestiture might be ordered, the particular respondent might possibly take, inter alia, any of the following steps, each of which could have different environmental consequences: a) the refinery could be sold; b) if sold, the selected purchaser could be a new entrant into the refining industry or one already engaged therein; c) the purchaser may expand the refinery or retain or even reduce its existing capacity; d) the respondent whose refinery has been sold may accept the resulting reduction in its refining capacity or attempt to compensate by building a new refinery or purchasing an already existing one. Moreover, plaintiffs allege that changes in refinery ownership would affect the operations of a refinery such as the sulphur content of the crude oil refined, the percentage of capacity at which it is operated, and the means of transportation used for crude oil and refined product. Each of these potential courses of action and effects may be beyond the control of the Commission, as they are within the discretion of respondents in the first instance and thereafter within the discretion of parties presently unidentified. In any event such actions cannot effectively be anticipated by the Commission. Preparation of an EIS at this preliminary stage of Exxon or at any time prior to formulation by the Commission of its proposal for relief would thus entail substantial speculation as to the environmental consequences of a myriad of possible actions that may never be proposed by the Commission, compounded by speculation as to the possible responses by plaintiffs and others to such actions.

33. The complexity of the petroleum industry and the breadth of this case as a practical matter prevent either (a) the EIS being prepared by Commission employees other than those currently working on Exxon or (b) the assigning of other people to prosecute Exxon while the current Exxon staff prepare an EIS. It has been my experience that the complexity of the petroleum industry with multinational corporations operating at each of the five functional levels -- exploration and production, crude oil transportation, refining, product transportation, and product marketing -- requires approximately 6-9 months of specialized study before a new employee is able to make meaningful contributions to prosecution of the case. A comparable amount of lead time would be necessary before a new attorney assigned to prepare an EIS would sufficiently understand the structure of the industry, the nature of the case, and the types of available remedies, so that he could begin an environmental impact analysis.

34. Based upon my understanding of the reach of this Court's orders of March 2 and March 14, 1977, it is my best estimate that even with fulltime work by as much as two-thirds of the Exxon staff, preparation of an acceptable draft EIS would most likely require substantial additional work to be done by outside consultants who have experience in preparing environmental analyses or who have some special knowledge regarding the potential environmental consequences of petroleum industry activities.

35. The substantial cost of retaining such consultants would further reduce complaint counsel's ability to prosecute Exxon pending the taking and resolution of this appeal. While it is impossible to estimate at this juncture the cost of the EIS that would have to be prepared in Exxon, it is my best estimate that preparation of the draft EIS could cost substantially in excess of \$2,000,000 in con-

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sultants' fees alone, assuming that consultants will be employed. This estimate is based upon information gathered from other federal agencies which have prepared environmental impact statements in connection with petroleum related activities. The cost of those statements, each of which dealt with a specifically identifiable and limited project, ranged from \$40,000 to \$5,000,000. A digest of this information is annexed hereto as Exhibit "C".

36. The congressionally approved Fiscal Year 1977 budget for Exxon allotted approximately \$2,000,000 for salaries of Commission employees and travel and just under \$4,000,000 for the use of outside litigation support contractors and consultants, as well as miscellaneous operating expenses. A substantial portion of the allotment for outside support and operating expenses has already been expended or obligated. The remainder will be needed for document discovery and essential operations. If \$2,000,000 must be diverted from what is remaining in litigation support contractor funds and used instead to retain consultants needed to prepare an EIS, there will be an immediate adverse impact on the progress of Exxon. Diversion of support funds necessary for the preparation of a draft EIS from the Exxon budget will severely curtail complaint counsel's present capability for rapidly screening, analyzing, and computerizing large volumes of documents through use of outside litigation support contractors. Curtailment of the capability would totally disrupt complaint counsel's document discovery plan and substantially delay each succeeding discovery stage and the ultimate trial of the case.

37. In conclusion, there has not been any proposal of federal action by the Commission in Exxon. The only forms of relief suggested here have been those tentatively stated by complaint counsel in their prosecutorial capacity at the

direction of the administrative law judge shortly after the commencement of the Exxon proceeding. Any EIS prepared at the present time with respect to complaint counsel's tentative recommendations would be in essence an analysis of proposals which themselves may change as Exxon proceeds through discovery, trial before and initial decision by the administrative law judge, and then finally to the Commission for its de novo review and final order. Given the budgetary and manpower restrictions within which complaint

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counsel must proceed as well as the length of time that will be needed for the completion of Exxon, a stay pending appeal would in no way preclude the preparation of the EIS at a later but nonetheless appropriate time and would enable complaint counsel to continue pending appeal the discovery of information necessary to the prosecution of Exxon and equally necessary to the preparation of an EIS.

Roger B. Pool
ROGER B. POOL

Sworn to and subscribed before
me this 15th day of April, 1977.

Marion A. Wells
NOTARY PUBLIC

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
EXXON CORPORATION,
a corporation;
TEXACO INC.,
a corporation;
GULF OIL CORPORATION
a corporation;
MOBIL OIL CORPORATION,
a corporation;
STANDARD OIL COMPANY OF CALIFORNIA,
a corporation;
STANDARD OIL COMPANY (INDIANA),
a corporation;
SHELL OIL CORPORATION,
a corporation; and
ATLANTIC RICHFIELD COMPANY,
a corporation.

DOCKET NO. 8934

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

EXHIBIT "A"

1. Respondents

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York 10020. Exxon is the nation's largest corporation with assets in 1972 exceeding \$21.5 billion. In 1972 its sales exceeded \$20 billion--second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd Street, New York, New York 10017. Texaco is the nation's third largest corporation with assets in 1972 exceeding \$12 billion. In 1972 its sales exceeded \$8.6 billion--eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania 15230. Gulf is the nation's sixth largest

corporation with assets in 1972 exceeding \$9.3 billion. In 1972, its sales exceeded \$6.2 billion--eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd Street, New York, New York 10017. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding \$9.2 billion. In 1972 its sales exceeded \$9.1 billion--seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at the Standard Oil Building, 225 Bush Street, San Francisco, California 94104. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding \$8 billion. In 1972 its sales exceeded \$5.8 billion--twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business

under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Avenue, Chicago, Illinois 60605. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding \$6.1 billion. In 1972 its sales exceeded \$4.5 billion--fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas 77002. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding \$5.1 billion. In 1972 its sales exceeded \$4 billion--seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Avenue, New York, New York 10020. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding \$4.6 billion. In 1972 its sales exceeded \$3.3 billion--twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. The Industry

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. Relevant Markets

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. Jurisdiction

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various states to locations in various other states of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. Acts and Practices

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid noncompetitive market structure, respondents, individually and with each other, have been and are engaged in, among others,

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the following acts and practices, some of which, inter alia, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing

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(e) Pursuing a common course of action of accomodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artificially high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accomodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices, thereby avoiding price competition in the marketing of refined petroleum products.

18. Respondents, individually and with each other, have followed and do follow common courses of action in accomodating the needs and goals of each other throughout the petroleum industry thereby increasing the inter-dependence of respondents and reducing respondents' incentive to behave competitively.

VI. Effects

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VI. Violations

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 18th day of July , 1973, issues its complaint against said respondents.

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NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 6th day of September A.D. 1973, at 10:00am o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, Pennsylvania Avenue, N. W., Washington, D. C. 20580 as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

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NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by the respondents and to restore competition in the relevant market or markets.

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IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be served by its Secretary and its official seal to be hereto fixed at Washington, D. C. this 18th day of July 1973.

By the Commission.

S E A L

Charles A. Tobin

Charles A. Tobin
Secretary

VI. CONTEMPLATED RELIEF

Three serious problems presently afflict the performance of the petroleum industry in the relevant geographic market. First, respondents control, directly and indirectly, a substantial portion of the market's refinery capacity and are able to exercise monopoly power at this level of production because of the formidable barrier to entry they have erected. Second, respondents' behavior threatens the viability of independent refiners and marketers resulting in losses to consumers. Third, respondents and some other large integrated firms have forsaken resort to genuine markets, preferring instead an artificial structure of non-market institutions resulting in costly distortions and anti-competitive exclusions of independent rivals. Indeed, had the petroleum industry been organized to depend upon free markets, it is doubtful that the present shortage of refinery capacity would have arisen.

To solve the industry's problems we must carefully choose remedies which will alleviate its underlying competitive deficiencies. Effective relief should (1) reduce refinery concentration; (2) reduce barriers to entry into refining; (3) make the industry more responsive to consumer demands with respect to product mix; and (4) create conditions and incentives which promote open-market transactions.

Commission counsel, on the basis of current information, are prepared to strongly urge the adoption of a package of remedies which are designed to accomplish the four stated goals. The appropriateness of these remedies of course will be determined on the basis of a full litigative hearing before the administrative law judge. It may be that, on the basis of such hearings, the proposed relief may be modified.

Commission counsel proposes that the chief form of structural relief be the divestiture of refinery capacity from each of the respondents in the relevant geographic market. After detailed analysis of the competitive problems facing the petroleum industry, Commission staff have concluded that 40% to 60% of respondents' refinery capacity in the relevant market should be divested and that 10 to 13 new firms should be established.

Since respondents' pipeline control is also a potent barrier to entry, any divestiture must include some pipeline assets. Commission staff propose that all crude and product pipelines which connect directly to the spin-off refineries and are typically owned and operated by the refining department of the parent, be divested totally to the new firms. Further, complaint counsel urge that fractional ownership shares in connecting joint venture pipelines be transferred to the new refinery companies. These divestitures will allow the new refinery firms to be both viable and independent from respondents, by assuring them of the access to major pipelines to be expected in a competitive market.

Refinery and pipeline divestiture contribute directly to attaining the remedial goals stated above. First, the relief clearly reduces refinery concentration and, therefore, monopoly power. Second, the remedy reduces barriers to entry in at least two ways. It dilutes pipeline ownership, giving new firms access to pipelines on equal terms with respondents. With reduced pipeline control, additional entry into the industry may be induced. Furthermore, under this remedy, respondents will become net sellers of crude oil and net buyers of gasoline for their marketing systems. Thus, the eight respondents will deal with independent refineries both as outlets for their crude oil and as suppliers for their retail outlets. As such, respondents will have little incentive to affect their profitability adversely. With satisfactory returns being earned by independent refineries, entry will be forthcoming.

Divestiture will also induce respondents to adapt their marketing strategy to the more competitive environment and encourage efficient independent marketers to expand. After divestiture, the respondents will be forced to bid for gasoline in the open market since their own refineries will not be able to produce enough gasoline to supply all of their stations. High volume efficient stations can bid more for gasoline than low volume inefficient branded stations; therefore, faced with higher input costs respondents will tend to close unprofitable

stations and retain high volume low cost outlets. Further, substantial new independent non-integrated refinery capacity will be created assuring independent marketers of increased sources of supply. If consumers choose to have more low priced gasoline without amenities, their demand will encourage independents to buy more refined gasoline from a genuine market and permit the independent marketing sector to expand to the level demanded by consumers.

Finally, the remedy will induce the creation of real markets for crude oil and refined products. Respondents will, after divestiture, have crude production in excess of refinery capacity and have an incentive to sell crude oil. Further, as mentioned previously, respondents will need to buy gasoline and other refined products. The exchange of crude oil and petroleum products will then occur in the market place rather than by agreement. Supplies of crude oil and refined products will be allocated by the price in the market place rather than being misallocated by company policies. Consumers will realize significant benefits from the imposition of competition where it has been present only rarely in the past.

Complaint counsel believe that several additional remedial measures should be adopted to buttress the Basic refinery and pipeline divestiture provisions. First, to avoid higher

concentration in the future, a ban against future refinery acquisitions should be entered. Second, to reduce concentration and to minimize anticompetitive contacts among respondents, a limit upon their joint ventures should be imposed. Third, to reduce effective concentration and to end the dependence of independent refiners upon respondents, processing arrangements should be limited. It is especially important that the new spin-off refiners not be encumbered by restrictive processing arrangements. Fourth, it may be demonstrated by the record of these proceedings that some limitation upon crude oil and product exchanges is required. While a full adjudicative record may lead to additional or different remedial requirements, the above relief is proposed on the basis of the present structure, conduct and performance of the industry.

The ills associated with the structure, conduct and performance of the petroleum industry and the need to relieve those ills are most dramatically illustrated in the situation currently being endured by American consumers in their purchases of essential petroleum products. The proposed remedy will work to prevent the recurrence of the present shortage of refinery capacity and ensure that the free enterprise system will operate to maintain an adequate economic base for America's future energy needs.

: SS;

EXHIBIT "C"

(f) the total time span from the date the Draft Environmental Impact Statement was begun until the Final Environmental Impact Statement was filed with Council of Environmental Quality.

3. Each of the persons contacted gave an estimate of the cost of preparing an Environmental Impact Statement on a very specific and detailed proposed construction project at a specific geographic location; each of these impact statements contain discussions of a limited number of alternatives available to the decision makers. Although the estimates given may provide a pertinent analogue in that they show the cost in dollars and man-effort of preparing a petroleum-related Environmental Impact Statement, reliance on these figures must be tempered by the realization that each EIS discussed relates to a specific construction project with a limited number of variables, a situation differing in magnitude from that presented by the far greater number of variables which might arguably have to be addressed by an EIS relating to the issues in the Exxon case.

4. On March 7 and 17, 1977, I contacted Mary Shaughnessy, an Environmental Impact Specialist employed by the Environmental Protection Agency, Region I. Ms. Shaughnessy has been actively involved in the preparation of the Draft Environmental Impact Statement for the Proposed 200,000 B/D Pittston Oil Refinery and Marine Terminal at Eastport Maine. The EPA has been working on this project for a year and a half. Three and one half man years of effort have been expended in preparing the draft EIS at an estimated cost of \$250,000.

5. On March 17, 1977, I contacted Lt. Richard G. Jones, Environmental Staff, Deepwater Ports Project, United States Coast Guard, Washington, D. C. Lt. Jones has been actively involved in the preparation of the Draft and Final Environmental Impact Statements for the SEADOCK and LOOP Deepwater Ports. LOOP is a proposed 1.4 million B/D (ultimately 3.4 million B/D) capacity deepwater port facility to be located eighteen miles south of the Grande Island, Louisiana Platform. SEADOCK is a proposed 2.5 million B/D (ultimately 2.5 million B/D) capacity deepwater port facility to be located twenty-six miles south of Freeport, Texas. Preparation of the Draft Environmental Impact Statement was completed in a five month period pursuant to the Deepwater Ports Act. Jones estimated that eighteen contractor man-years and one agency man-year were expended in the preparation of the Draft Statements at an approximate cost of \$750,000. The Final Statements were prepared in a six month period. Jones estimated that thirteen contractor man-years and one agency man-year were expended at an approximated cost of \$525,000.

6. On March 7 and 8, 1977, I contacted J. W. Thursby, Head of the Environmental Unit, Delaware River Basin Commission. Mr. Thursby directed the preparation of the Environmental Impact Statement relating to the proposed Interstate Energy Company 83 mile residual fuel oil pipeline. Preparation of the Draft and Final Environmental Impact Statements took two years and two months. Mr. Thursby estimated that eighteen man months were expended at a approximate cost of \$60,000.

7. On March 7, 1977, I contacted Russel A. Soulen, Assistant Manager, Alaska Natural Gas Transportation System, Department of the Interior. Mr. Soulen directed the preparation of the Environmental Impact Statements for the Alaska Natural Gas Transportation System. The proposed pipeline system to be built by a consortium of sixteen companies is to be approximately 5,557 miles long, originating on the southwest shore of Prudhoe Bay, Alaska and terminating at one point south of San Francisco and at another in Western Pennsylvania. The combined Draft and Final Environmental Impact Statements cost approximately \$5 million and involves the labor of approximately one hundred sixty people full and part-time over a twenty month period.

8. On March 7, 1977, I contacted Bert Rogers, Acting Chief, Branch of Marine Environmental Assessment, Department of the Interior. Mr. Rogers is involved in the preparation of the Environmental Impact Statements which precede Outer Continental Shelf Lease Sales. Mr. Roger explained that there are two types of sales for which statements must be prepared: frontier area sales and developed area sales. The combined Draft and Final Environmental Impact Statements for each sale in a frontier area cost approximately \$700,000, and require approximately 40 man months of labor. The combined Draft and Final Environmental Impact Statements for each sale in a developed area cost approximately \$450,000 and require approximately 25 man months of labor.

9. On March 18, 1977, I contacted LCdr. John S. Henley, C.E.C., U.S.N. Special Assistant for Plans and Programs Department of the Navy, Washington, D. C. Mr. Henley is involved in the preparation of two Environmental Impact Statements: one relating to the Continuing Exploration and Evaluation of NPR - 4 Alaska (zone A) and the other to the Elk Hills Petroleum Reserve Pipeline Project. The Impact Statement relating to the Continuing Exploration and

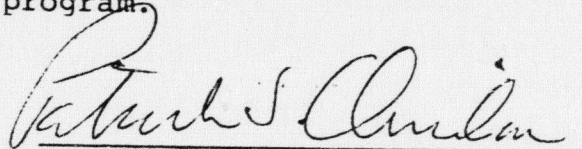
Evaluation of NPR - 4 Alaska (zone A) deals with a proposal to drill nineteen additional exploratory wells on the Petroleum Reserve. Preparation of the combined draft and final EIS for this project consumed 1.6 man-years of effort at a cost of \$150,000. The entire EIS project took 19 months to complete. The Impact Statement relating to the Elk Hills Petroleum Reserve Pipeline Project deals with three alternative crude oil pipeline routes, the longest of which would be one hundred eighty miles, capable of transporting 200,000 - 250,000 B/D. The proposed cost of the Draft Impact Statement is \$403,660. The Department expects the draft to be completed in seven months.

10. On March 18, 1977, I contacted Beverly Crispin, Environmental Protection Specialist, Federal Energy Administration, Washington, D. C. Ms. Crispin is actively involved in the preparation of the Revised Draft Environmental Impact Statement for Section 2 ESCA. This programmatic Impact Statement deals with the Coal Conversion Program. The draft EIS was prepared in eight months at a contract cost of \$100,000 plus an estimated three to four man months of agency labor.

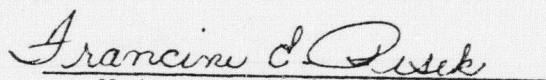
11. On March 7, 1977, I contacted Carol Borgstrom, Environmental Program Specialist, Federal Energy Administration, Washington, D. C. Ms. Borgstrom is familiar with the cost of preparing the Draft Environmental Impact Statement relating to construction of specific site Synthetic Natural Gas Plants. She stated that contracts have been entered into for preparation of the draft EIS; each site contract price is approximately \$40,000 to \$50,000.

12. On March 18, 1977, I contacted Steven E. Ferguson, Director, Office of Environmental Programs, Federal Energy Administration, Washington, D. C. Preparation of the draft and final Strategic Petroleum Reserve EIS cost \$160,000 and took approximately one year to complete. Specific site EISs cost approximately \$75,000 each. Presently, \$1.2 million has been appropriated for preparation of three Environmental Impact Statements relating to the clustered specific storage sites. Two clusters are to contain five storage sites each, the other cluster is to contain four storage sites.

13. On March 18, 1977, I contacted Carol Borgstrom, Environmental Program Specialist, Federal Energy Administration, Washington, D. C. Ms. Borgstrom is familiar with the cost of preparing the Draft Environmental Impact Statement on the Cumulative Production/Consumption Effects of Crude Oil Price Incentive Rulemaking. She stated that \$160,000 has been appropriated to prepare the Impact Statement relating to this program.


Patrick J. Quinlan

Sworn to and subscribed before me this 31st day of March, 1977.


Notary Public
(My Commission Expires)

My Commission Expires June 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOBIL OIL CORP., et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
FEDERAL TRADE COMMISSION, et al.,	)
	)
Defendants.	)

AFFIDAVIT OF JOHN F. DUGAN

CITY OF WASHINGTON)
) ss
 DISTRICT OF COLUMBIA

John F. Dugan, being of lawful age and being first duly sworn, deposes and says:

1. I am employed by the Federal Trade Commission as its Acting Secretary. As such, I am the official custodian of all records of the Commission. I make this affidavit by direction of the Commission and on the basis of information from the Commission's files, and in support of the Commission's motion for a stay of the order of the Court in the above case which would require the Commission to immediately commence preparation of a draft environmental impact statement in connection with administrative proceedings pending before an administrative law judge in Docket No. 8934.

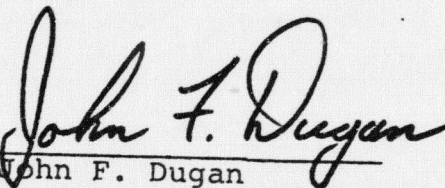
2. The Commission issued its complaint in Docket No. 8934 on July 18, 1973, a copy of which is attached as an exhibit here. At the time the complaint issued, the Commission's Rules of Practice dictated that, "where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint" accompany the complaint. 16 C.F.R. §3.11(b)(3) (1973). In the vast majority of cases the Commission's complaints have been

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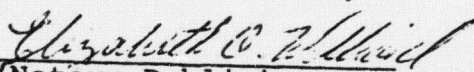
accompanied by a proposed order or other form of notice of relief proposed by the Commission.

3. To date the Commission itself (as distinguished from complaint counsel) has made no proposal for any type of relief in Docket No. 8934. Since the date of issuance of the complaint the Commission has not been asked to consider any proposals for relief in the event that the Commission concludes that some or all of the violations alleged in the complaint in fact occurred.

4. Under the Commission's rules, there will be no further occasion for the Commission to make any proposals for relief until the matter returns to the Commission on appeal from an initial decision of the Administrative Law Judge in this matter.


John F. Dugan

Sworn to and subscribed before me this 5th day of April 1977.


(Notary Public)

MY COMMISSION EXPIRES OCTOBER 31, 1979.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY and STANDARD OIL COMPANY OF CALIFORNIA,	:	75 Civ. 2748 (JMC)
Plaintiffs,	:	
-against-	:	AFFIDAVIT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO STAY PENDING APPEAL
FEDERAL TRADE COMMISSION; and LEWIS A. ENGMAN, Chairman, PAUL RAND DIXON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN NYE, Member, and MAYO J. THOMPSON, Member and CHARLES A. TOBIN, Secretary; as officers of the FEDERAL TRADE COMMISSION,	:	
Defendants.	:	

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STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

ANDREW J. KILCARR, being duly sworn, depose and says:

1. I am a member of the firm of Donovan Leisure Newton & Irvine, and am counsel to plaintiff Mobil Oil Corporation ("Mobil") in this action as well as in the related Federal Trade Commission case known as In the Matter of Exxon Corporation, et al. (Docket No. 8934 - hereinafter "Exxon"). I am familiar with the facts and proceedings described herein and I submit this affidavit in support of plaintiffs' opposition to the Government's application for a stay pending appeal.

2. On October 17, 1975 the Administrative Law Judge assigned to the Exxon proceeding, the Honorable Alvin L. Berman, formally recommended to the Federal Trade Commission that withdrawal of the Complaint in that proceeding be considered. Judge

Berman's recommendation was contained in a document entitled "Certification to Commission of Recommendation of Administrative Law Judge that Commission consider withdrawal of Complaint," which was entered and made part of the record in the Exxon case. A copy is attached as Appendix "A" and is hereinafter referred to as "Certification."

3. In the Certification, Judge Berman advised the Commission in detail as to the relief being urged by Complaint Counsel.

"While the complaint does not notice any contemplated order, Complaint Counsel have urged the following relief: structural relief, the chief form of which is the divestiture from respondents of from 40 percent to 60 percent of their refinery capacity in the relevant market and the establishment of from 10 to 13 new firms in that market; divestiture of crude and product pipelines owned by parent companies, which directly connect to the spin-off refineries, to those refineries; and divestiture of fractional ownership shares in connecting pipelines to the new refinery companies."
(p. 2)

4. It was Judge Berman's stated position in the Certification that

"Subsequent to the issuance of the Complaint, however, certain events have occurred which, it is believed, warrant reconsideration by the Commission of proceeding further under this complaint."
(p. 2)

5. Following enumeration of some of these events, including inter alia, the sharp rise in the cost of imported crude oil and the emerging United States policy to achieve energy independence, Judge Berman stated

"It is in this atmosphere of the material changes that have taken place in the oil industry and the overall national policy that is still to be effectuated and implemented that it is recommended that the Commission reconsider whether to

proceed under the instant complaint. Involved are not merely changes since issuance of the complaint which pertain to the allegations of the complaint and underlying theories (which will be developed later) but questions of (1) whether it would be in the public interest to pursue a case of the present magnitude which is not directed to the energy shortage problem and (2) whether the present proceeding and the relief proposed or available to the Commission is, or may be consistent with public policy in resolving what is one of the most crucial issues this nation as ever faced." (pp. 2-3, emphasis added)

6. Subsequently in the Certification, Judge Berman elaborated as follows upon the appropriateness of the divestiture proposal in the Exxon case:

"As noted above, while the complaint does not contain a 'notice' order, complaint counsel have urged as primary relief a restructuring of the eight largest petroleum companies in the relevant market by requiring divestiture of 40 percent to 60 percent of their refinery capacity to some 10 to 13 newly created companies and divestiture of related pipelines and pipeline interests to those new companies. This raises the basic question of whether any major restructuring (or control) of the petroleum industry should be contingent upon the resolution and implementation of a national policy to resolve the energy crisis or should be pursued under the instant complaint which is not addressed to that problem. And, of course, there is the problem of whether, or the extent to which, any relief that may be ordered under the instant case will be consistent with action that may be taken as part of the national policy."

7. On October 23, 1975, the Federal Trade Commission responded to Judge Berman's aforesaid recommendation, its order stating in relevant part

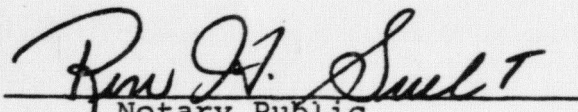
"This matter is before us upon an order dated October 17, 1975, certifying the administrative law judge's recommendation that the Commission consider withdrawal of the complaint. The Commission has considered the law judge's recommendation and has determined that the com-

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plaint should not be withdrawn" (copy attached
as Appendix "B" (emphasis added)


Andrew J. Kilcarr

Sworn to and subscribed before
me this 28th day of April, 1977


Notary Public
- ROSE H. SUELI
Notary Public, State of New York
No. 41-3891000
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1979

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
EXXON CORPORATION,
a corporation, et al.

DOCKET NO. 8934

CERTIFICATION TO COMMISSION OF RECOMMENDATION
OF ADMINISTRATIVE LAW JUDGE THAT COMMISSION
CONSIDER WITHDRAWAL OF COMPLAINT

In its complaint issued in July 1973, the Commission charged the nation's eight largest petroleum companies with having violated Section 5 of the Federal Trade Commission Act. All eight respondents were described as vertically integrated companies operating at all of the following five basic levels of the petroleum industry: (1) exploration and production of crude oil; (2) transportation of crude oil; (3) refining of crude oil; (4) transportation of refined petroleum products; and (5) marketing of refined petroleum products.

Respondents were charged with having combined or agreed to monopolize, with having maintained monopoly power and, individually and with each other, with having restrained trade and maintained and reinforced a non-competitive market structure with respect to the refining of crude oil in the relevant market.

The complaint was not accompanied by a "Notice" order. Rather, in a "Notice of Contemplated Relief", it was stated that if respondents were found to be in violation of the law as charged, "the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anticompetitive practices engaged in by the respondents and to restore competition in the relevant market or markets."

REC'D OCT 20 1975

While the complaint does not notice any contemplated order, complaint counsel have urged the following relief: structural relief, the chief form of which is the divestiture from respondents of from 40 percent to 60 percent of their refinery capacity in the relevant market and the establishment of from 10 to 12 new firms in that market; divestiture of crude and product pipelines owned by parent companies, which directly connect to the spin-off refineries, to those new refineries; and divestiture of fractional ownership shares in connecting pipelines to the new refinery companies.

Other non-structural remedies to buttress the basic refinery and pipeline divestiture provisions would include: (1) a ban on future refinery acquisitions; (2) a limit on joint ventures; (3) a limit on processing arrangements between respondents and independent refiners; and (4) a limitation upon crude oil and product exchanges.

As noted above, this complaint was issued in July 1973 in the light of then and prior existing conditions in the petroleum industry. Subsequent to issuance of the complaint, however, certain events have occurred which, it is believed, warrant reconsideration by the Commission of proceeding further under this complaint. These events include the embargo on oil shipments from the Middle East (which, while no longer in effect, remains as a real possibility that confronts us), the sharp rise in the cost of imported oil to the point that it now exceeds the cost of domestic crude, the nationalization by foreign countries of petroleum and the exercise by such nations of control over oil prices and supplies, the escalation of petroleum product prices and our emerging national policy to achieve energy independence. Another important event that occurred subsequent to issuance of the complaint was the repeal of the oil depletion allowance (Tax Reduction Act of 1975, P.L. 94-12, Section 501).

While the need for a national energy policy to make this country relatively independent from reliance upon foreign energy sources is generally recognized, the means for achieving such independence has not yet been resolved. It is in this atmosphere of the material changes that have taken place in the oil industry and the overall national policy that is still to be effectuated and implemented that it is recommended that the Commission reconsider whether to proceed under the instant complaint. Involved are not merely changes since issuance of the complaint which pertain to the allegations of the complaint and underlying theories (which will be developed later) but questions of (1) whether

it would be in the public interest to pursue a case of the present magnitude which is not directed to the energy shortage problem and (2) whether the present proceeding and the relief proposed or available to the Commission is, or may be, consistent with public policy in resolving what is one of the most crucial issues this nation has ever faced.

PUBLIC INTEREST IN PURSUING CASE OF
PRESENT MAGNITUDE WHICH IS NOT
DIRECTED TO ENERGY SHORTAGE PROBLEM

Complaint counsel have consistently taken the position that the complaint does not pertain to the fuel shortage, that "those studies and underlying materials [which] relate to the fuel shortage, its causes and effects are completely irrelevant to the true issues of the Exxon complaint." 1/ Obviously, matters pertaining to achieving increased fuel and other energy production would equally be precluded. 2/

Even though it is not directly pertinent to the current national crisis, the instant case will require the expenditure of an unusual amount of time, effort and money even before the case is ready for trial. For example, in order to identify the organizational arrangements and joint ventures of respondents related to the petroleum industry,

1/ Response of Complaint Counsel to the Merits of Respondents' Application for the Issuance of Additional Subpoenas for Documents in Government Files, p. 9 (April 23, 1975). See also, Opposition of Complaint Counsel to Request for Depositions of Certain Government Officials and Others, pp. 3-4 (April 8, 1974).

2/ An exception would be at the refining level. The thrust of the complaint is that, when there is a shortage, the brunt falls upon independent and non-integrated refiners. Note 1, supra. It is only to the extent that this factor and other barriers to entry limit or reduce the effective competition of independents and non-integrated refiners that the supply of petroleum products may be affected. Given a situation where the national policy is to supply as much of refining needs as possible from domestic production and domestic production is by far inadequate to supply those needs, the effect of this case upon overall fuel production in this country is questionable.

identify relevant records that may be maintained and secure an explanation of their contents, location and custody, complaint counsel are in the process of deposing and voluntarily interviewing some 50 officials and employees of respondents. The first deposition was taken in May 1975 and, so far, some 7,500 pages of depositions and transcribed interviews have been conducted. Following completion and analysis of this first wave of discovery, complaint counsel have stated that some 16 months will be required to secure, review, process and evaluate several million documents of respondents. Following this second wave of discovery, complaint counsel anticipate a third wave lasting some 10 months during which time depositions of some 500 to 700 of respondents' officials and employees will be taken. Complaint counsel have listed 677 general subjects to be explored with respect to the domestic area and 61 subjects to be covered with respect to the international aspects of this case. Complaint counsel anticipate that they will be ready for trial some 3 years after commencement of discovery. 3/

Given the changes in facts that have occurred since issuance of the complaint and the much broader crisis facing this nation, it is recommended that the Commission consider whether it is preferable, in the public interest, to have such extensive discovery under the complaint (followed by hearings) or, if warranted, to conduct a broader investigation under Section 6 of the Federal Trade Commission Act which investigation could cover the vital issues facing the nation. To the extent that matters now falling under the complaint might be encompassed in any overall investigation, they could, of course, be included. If, in the course of such an investigation, any evidence of law violation were uncovered, the Commission could then take appropriate action, including issuance of a complaint.

In this connection, it must be recognized that any discovery to be allowed in the course of an adjudication must be justified as relevant to the complaint. The assignment of the undersigned is to try this case within

3/ These estimates are taken from complaint counsel's motion for integrated relief, and appendices thereto, filed with the Commission on October 18, 1974. This recitation should not be taken as a predetermination with respect to any discovery requests not yet presented to the undersigned.

the confines of the complaint. It is not his function nor is he authorized to use this case as a vehicle to conduct a general investigation of the petroleum industry or of the fuel shortage, its causes and effects and any responsibility of the oil companies therefor. See, Hermann v. Civil Aeronautics Board, 257 F.2d 359, 362 (9th Cir. 1956). 4/

On the other hand, the Commission may conduct a general investigation analogous to that conducted by the grand jury; it may inquire into the petroleum industry and the energy crisis merely on suspicion that the law is being violated or just to secure assurance that it is not; it may satisfy its curiosity of whether corporate behavior is consistent with the law and the public interest. United States v. Morton Salt Co., 338 U.S. 632, 642, 652 (1950). The Commission's investigation would not be subject to the strictures of a complaint. Genuine Parts Co. v. Federal Trade Commission, 445 F.2d 1332, 1337-38 (5th Cir. 1971).

It is recommended, therefore, that, in light of events occurring subsequent to issuance of the complaint in this matter, the Commission consider whether it would be in the public interest to proceed under this complaint as opposed to conducting an investigation to be followed by such action as may be deemed appropriate.

CONSISTENCY OF PRESENT PROCEEDING AND OF PROPOSED AND POSSIBLE RELIEF WITH NATIONAL POLICY IN RESOLVING ENERGY CRISIS

Divestiture

As noted above, while the complaint does not contain a "notice" order, complaint counsel have urged as primary relief a restructuring of the eight largest petroleum companies in the relevant market by requiring divestiture

4/ Notwithstanding the perimeters of this case and the fact that it is an adjudication, it has been mistakenly reported in the press as an "energy-crisis investigation". See, e.g., article of Louis M. Kohlmeier, Birmingham, Alabama News, June 6, 1975. This article is not cited to call the Commission's attention to erroneous newspaper reporting, but rather as a reflection of what the press and the public expects of the Commission.

of 40 percent to 60 percent of their refinery capacity to some 10 to 13 newly created companies and divestiture of related pipelines and pipeline interests to those new companies. This raises the basic question of whether any major restructuring (or control) of the petroleum industry should be contingent upon the resolution and implementation of a national policy to resolve the energy crisis or should be pursued under the instant complaint which is not addressed to that problem. And, of course, there is the problem of whether, or the extent to which, any relief that may be ordered under the instant case will be consistent with action that may be taken as part of the national policy.

Joint Ventures

A basic aspect of the case relates to the joint ventures and other cooperative arrangements engaged in by respondents. These include joint ventures in exploration for and development of crude oil sources, arrangements to jointly bid on crude leases followed by joint ownership and operation thereof and joint ventures in constructing and operating major crude and product pipelines. 5/ Such joint ventures are alleged to facilitate cooperation among respondents rather than competition, to have increased concentration and to contribute to a non-competitive market. 6/ It is asserted that there is no economic justification for joint ownership of crude oil pipelines. 7/

5/ Complaint counsel's Narrative Description of the Petroleum Industry ("Narrative Description"), pp. 3-6, 17; Complaint counsel's Outline of Principal Facts To Be Proven Against Each Respondent ("Principal Facts"), Nos. 3-47, 127, 141-43, 145-55, 296-304, 346-54.

Complaint counsel filed a Prediscovery Statement on February 24, 1974, pursuant to order of Administrative Law Judge Moore. This statement, inter alia, contained a Narrative Description of the Petroleum Industry, an Outline of Principal Facts to be Proven Against Each Respondent, a Statement of Legal and Factual Issues and a statement of Contemplated Relief. This was the first step in what was intended to lead to a delineation of the issues of fact and law to be tried in this proceeding.

6/ Principal Facts, Nos. 67, 141-43.

7/ Principal Facts, Nos. 302-03.

As one feature of contemplated relief, complaint counsel proposed that, "to reduce concentration and to minimize anticompetitive contacts among respondents, a limit upon their joint ventures should be imposed. 8/

The above leads to the conjecture of whether, as a matter of national policy in solving the energy crisis, joint ventures may be encouraged or deemed acceptable. Consider, for example, the joint venture enterprise in constructing the Alaskan Pipeline. On the other hand, it is reported that the Department of Interior has implemented executive policy by issuing regulations prohibiting companies producing more than 1.6 million barrels a day of crude oil, natural gas and liquified petroleum products from making joint bids for federal offshore leases, except that they may bid jointly with smaller companies. 9/

The question thus arises whether the Commission should pursue the present adjudication with a view to ordering such limits on respondents' joint ventures as may be deemed appropriate on the basis of the adjudication or whether this is a matter better left to the executive and legislative branches in their resolution of how to cope with the energy crisis. At the very least, there is the problem of whether any order that may be issued under the complaint would be consistent with national policy in coping with the energy crisis, particularly as that policy may change from time to time.

Restoration of Competition to Secure Lower Prices

The complaint (Pars. 16(e) and (f) and 19(a), (g) and (h)) charges respondents with having effectuated artificially high price levels and excessive profits with consumers having paid higher prices than they would have in a competitively structured market. It is the underlying purpose of the complaint to restore competition, 10/ including price

8/ Complaint counsel's statement of Contemplated Relief, p. 141.

9/ Wall Street Journal, September 29, 1975, at p. 3.

10/ The restoration of competition is specified as an objective in formulating necessary and appropriate relief (in the event a violation is found) in the Commission's Notice of Contemplated Relief.

competition, so that ultimately the consuming public may enjoy lower prices.

This, of course, is the general objective of instituting antitrust litigation. For the petroleum industry, however, many advocate a public policy of allowing higher prices and profits (with windfall profits taxation utilized as appropriate) with the twofold objective of encouraging energy exploration and production on the one hand and discouraging energy consumption on the other. To the extent that this may become national policy, or to the extent that any other or different controls may be imposed 11/, the Commission may wish to reconsider proceeding under this complaint which was not drafted in contemplation of such a situation.

Utilization of Inefficient, High Cost, Low Yield Wells

Complaint counsel assert that respondents have denied society the savings from cheap and plentiful crude oil by limiting the transportation capacity serving such pools 12/ and are at the same time responsible for society's resources not being allocated in the most efficient manner in that the higher prices caused by respondents have resulted in the utilization of inefficient stripper wells and

11/ For example, during price control, independent marketers were favored by the Emergency Petroleum Allocation Act of 1973 and an "entitlements program" adopted in November 1974, under which they received favored treatment. (Federal Trade Commission Staff Report on the Effects of Decontrol on Competition in the Petroleum Industry, September 5, 1975, pp. 8-10). It has been reported that President Ford, in the event of decontrol, favors continuation for a time of the "entitlements program". Continental Oil Company, as an example, has advocated legislation to require refiners to give all buyers equal access to gasoline suppliers. It is possible that, in the event of the expiration of price control and accompanying programs, some legislation may well be enacted to assure supplies to independents.

12/ Narrative Description, p. 22; Principal Facts, Nos. 214, 215, 437, 449.

wells and fields of high cost and low yield. ^{13/} This assertion appears to be in conflict with (1) the concept that America does not have plentiful oil in terms of being self-sufficient, (2) the fact that cheap oil is not available from any source ^{14/} and (3) the proposed national policy espoused by many that high prices and profits should be allowed in order to encourage the development of relatively inefficient, high cost and low yield wells as a step toward self sufficiency.

In view of the above noted conflicts between the concepts underlying the complaint and what may be adopted as national policy, the Commission may wish to reconsider whether to proceed under the complaint.

EVENTS OCCURRING SINCE ISSUANCE OF
COMPLAINT AS AFFECTING ALLEGATIONS OF FACT
AND THEORIES UNDERLYING THE COMPLAINT

Respondents' Asserted Control of Pricing
and Supply of Crude Oil, Both Domestic
and Imported, and Advantages Secured Thereby

In assessing the charges of the complaint, complaint counsel's Prediscovery Statement begins with the assertion that "[r]espondents are all vertically integrated firms with substantial horizontal concentration at every level of the industry. It is a central allegation of the complaint that their market power in refining derives from and is protected by their power at other levels."; that, as a result of respondents' heavy concentration on crude oil production,

^{13/} To the extent that cheap oil is still available because of price controls on "old oil", this may be deemed by the Commission to constitute a short term circumstance better addressed by price control and companion controls--not one to be remedied by a complaint which contemplates a free competitive situation.

^{14/} To the extent that complaint counsel have asserted the existence of cheap and plentiful oil, the Commission may wish to reconsider whether to proceed under the complaint on the basis of "Events Occurring Since Issuance of Complaint as Affecting Allegations of Fact and Theories Underlying the Complaint"--the next topic for discussion.

they "exert substantial control over the price and supply of crude oil". 15/

Complaint counsel develop this central theme by asserting that respondents have maintained artificially high prices for crude oil and so have shifted profitability from the refining level of the industry; that this is merely a bookkeeping matter between respondents' divisions whereas non-integrated refiners, who must purchase crude oil at prices set by respondents, incur real burdensome expenses. 16/

This theme permeates complaint counsel's Outline of Principal Facts To Be Proven Against Each Respondent ("Principal Facts"). The following allegations are exemplary. Respondents, through common courses of action and agreements have maintained crude oil prices at artificial levels and through such control have depressed the profitability of independent refiners. 17/ Respondents' control over access to and pricing of crude oil results in barriers to entry in refining. 18/ The high profits and rates of return realized by respondents at the production level are not warranted. 19/ However, independent non-integrated refiners and other purchasers do not have sufficient market power to force a reduction in crude oil prices and so must adhere to the high prices set by respondents. 20/

Complaint counsel advert to the oil depletion allowance as providing an incentive for respondents' high crude oil prices since the tax deduction is related to the price of crude oil. Therefore, the higher the price charged, the

15/ Narrative Description, p. 7.

16/ Narrative Description, pp. 14-15.

17/ Principal Facts, Nos. 110, 111, 169-72, 175.

18/ Principal Facts, Nos. 132, 177.

19/ Principal Facts, Nos. 144, 420, 421.

20/ Principal Facts, No. 178.

greater the tax deduction. 21/ To the extent that respondents are able to set high prices for crude oil, which profits are offset by the oil depletion tax benefits, they are able to evade profits and taxes accruing at downstream levels. 22/ Correspondingly, by increasing sales of petroleum products at the marketing level, even to the extent of overinvesting at that level, respondents have increased their volume and profits at the crude oil production level where the tax benefits of the oil depletion allowance are realized. 23/

It is alleged that respondents maintain and exercise similar control over the supply and prices of imported crude oil; that respondents, through common courses of action and agreement, have maintained international crude prices at artificial levels; that ownership of foreign oil was primarily in seven international companies (six of the respondents 24/ and BP), which substantially controlled world crude prices and supply; that the foreign sources of supply have provided crude at the lowest production cost; that respondents can import their own foreign production at cost while independent refiner-importers must pay the artificially high market price; that, consequently, respondents are able to control or significantly affect crude oil supply and prices in the United States, including the price and production of domestic crude and influence the profitability of domestic refining; and that all of this has contributed to the maintenance of a non-competitive market structure in the relevant market. 25/

21/ Principal Facts, Nos. 189-96, 203. It is also stated that the tax lets respondents depreciate the value of certain assets more than once (Principal Facts, No. 195).

22/ Principal Facts, Nos. 173, 174.

23/ Principal Facts, Nos. 412, 414-18.

24/ The six respondents named are Gulf, Exxon, Standard Oil of California, Texaco, Mobil and Shell (Principal Facts, No. 220). Respondents Standard of Indiana and Atlantic Richfield are alleged to have increased their activities with the seven international companies through joint ventures and other common arrangements (Principal Facts, No. 230).

25/ Narrative Description, p. 9; Principal Facts, Nos. 116, 125, 220-25, 231-56, 265, 266.

Changes Pertaining to Respondents'
Asserted Control, etc.

In late 1973, OPEC countries (those belonging to the Organization of Petroleum Exporting Countries) took over the pricing of their oil and escalated nationalization of crude oil production. Thus, both price and supply of imported oil is reported by the Federal Energy Administration and the staff of the Federal Trade Commission to be out of the hands of respondents. 26/

OPEC boosted crude oil prices sharply to the point that they were greatly in excess of domestic oil prices which were subject to price control. At this writing, it is unclear whether, or the extent to which, domestic crude oil prices will continue to be subject to price control. In any event, the pricing of imported crude by OPEC will be a major factor on the oil industry in the United States. Even if price control is continued on domestic oil, it is predicted that large quantities of imported crude oil. OPEC prices will continue to be required in the foreseeable future. 27/ If price control is lifted, the Commission's Bureaus of Competition and Economics foresee the price of domestic crude rising to that of imported oil. Again, this would not be a price set by the oil companies, but rather the level established by OPEC. 28/

The Commission's Bureaus of Competition and Economics do not foresee a squeeze by integrated companies on refining profit margins in favor of higher crude prices and profits. 29/

26/ Federal Energy Administration, The Relationship of Oil Companies and Foreign Governments, June 1975, p. v; Federal Trade Commission Staff Report on the Effects of Decontrol on Competition in the Petroleum Industry, September 5, 1975 ("FTC 9/5/75 Staff Report"), pp. 13, 15.

27/ FTC 9/5/75 Staff Report, p. 17.

28/ Id. at 12-13.

29/ Id. at 16-19. One reason, given among others, is that "any indication of deliberate or concerted predation would become material evidence in the currently pending FTC proceeding against the eight largest U.S. petroleum companies" (at p. 18). This consideration, of course, does not constitute a suggestion that the present case be continued in order to restrain respondents from engaging in predatory pricing.

The first factor relied upon by the Commission's staff for this analysis is the repeal of the oil depletion allowance:

One important fact is that percentage depletion tax allowances have been eliminated for sizeable crude producers. In the past, the depletion allowance provisions encouraged integrated crude producers with a high self-sufficiency ratio to set crude prices which shifted as much profit as possible to the crude production stage, even if their refineries had to report zero returns. To the extent that integrated companies were successful in achieving this price structure and sold crude at the same prices to non-integrated refiners, a serious squeeze was imposed upon the latter. Again, this distortion of incentives no longer exists. 30/

Taking into account past price increases and those which are anticipated in the future, the Commission's staff anticipates a continued situation of refineries operating at below optimal rates. 31/ This contemplates a lowering of demand because of higher prices and an availability of crude to all refiners, including non-integrated independents. 32/ To the extent any integrated oil company or companies may divert oil from independents, it is anticipated that the independents would be able to satisfy their requirements from other domestic companies or from foreign sources, and at the same prices. 33/ In summary, with the ending of price controls, the Commission's staff does not foresee independent non-integrated refineries experiencing any particular difficulty in securing all the crude oil they want, although they would not be in a position to strike bargains for the oil they secure. 34/

This prediction is to be compared with the allegations of the complaint that, as a result of the acts and practices alleged, independent and non-integrated refiners are being denied the crude oil they require (Complaint, Pars. 16, 19(d), (e) and (f)).

30/ Id. at 16.

31/ Id. at 17.

32/ Id. at 13.

33/ Id. at 14-15. And see supra, p. 8, n. 11.

34/ Id. at 13-16.

In view of the changes since issuance of the complaint perceived and contemplated by the Commission's Bureau of Competition and Economics that (1) integrated oil companies no longer have advantages because of the availability to them of cheap imported crude, (2) prices for crude will level at those set by OPEC and will not be set by integrated oil companies, (3) supplies of imported oil will also be established by OPEC, (4) integrated companies, primarily by reason of the repeal of the oil depletion allowance, will not squeeze refining profit margins in favor of higher crude prices and profits and (5) independent non-integrated refiners will be able to secure all of their refining needs at the price level set by OPEC, it is recommended that the Commission reconsider whether to proceed under the complaint in this matter.

CONCLUSIONS, RECOMMENDATION AND ORDER

In the Preliminary Federal Trade Commission Staff Report On Its Investigation Of The Petroleum Industry of July 12, 1973, issued about one week before issuance of the complaint in this matter, it was stated, "The most important factor [in forecasting the complexion of the oil industry five years from now] will be the shape of governmental policy towards the oil industry." Since that report and since issuance of the complaint a number of important events have taken place including repeal of the oil depletion allowance, the sharp increase in the price of imported crude oil to the extent that it presently is more expensive than that produced domestically, the nationalization by foreign countries of petroleum and the exercise by such companies of control over prices and supply, the escalation of petroleum prices, the possible imminence of the end of price control and the almost universally agreed to national policy that this country must achieve independence from reliance upon foreign energy sources.

In view of the necessity to effectuate and implement such a national policy, the analysis of the Commission's staff that the most important factor bearing upon the complexion of the oil industry will be the shape of governmental policy rings particularly true.

Such a governmental policy directed to the energy crisis, while required, is yet to be shaped. In whatever form adopted, circumstances may dictate reevaluation and modification as time goes by. In the light of the emergence of the

national policy since issuance of the complaint and in consideration of whether the present proceeding and the relief proposed or available to the Commission is, or may be consistent with, public policy in resolving the energy crisis, it is recommended that the Commission reconsider whether to proceed under the complaint in this matter.

The present case is of enormous magnitude. Complaint counsel will be required to engage in extensive discovery before they will be ready to go to trial. Complaint counsel anticipate that it will take years to secure, review, process and evaluate millions of respondents' documents and depose some 500 to 700 of respondents' officials and employees with some 700 general subjects being covered. The case obviously will require the expenditure of vast amounts of time, effort and money.

Given the situation that the present complaint does not pertain to the energy crisis, it is recommended that the Commission reconsider whether to continue with this complaint and the discovery within the strictures of the complaint as opposed to conducting a more general investigation which would encompass the energy crisis, would not be limited by specific charges and could then be followed by appropriate action, including issuance of any complaint that might be merited.

The recommendation that the Commission reconsider whether to proceed under the complaint in this matter is further made in light of the changes and events since issuance of the complaint, as perceived and contemplated by the Commission's Bureau of Competition and Economics, to the extent that those changes and events bear upon allegations of fact and theories underlying the complaint. These are enunciated in the Federal Trade Commission Staff Report On The Effects Of Decontrol On Competition In The Petroleum Industry, September 5, 1975, are summarized at p.14, supra and are more fully analyzed in relationship to this proceeding at pp. 9-13, supra. 35/

35/ See also, p. 9, n. 14, supra, for additional allegations of fact which may be deemed to have been affected by events occurring subsequent to issuance of the complaint.

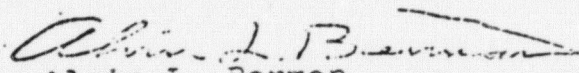
The undersigned has not attempted to present or analyze all of the factual allegations and theories underlying the complaint. For example, complaint counsel have presented
(footnote continued)

The recommendation that the Commission reconsider whether to proceed under the complaint is arrived at solely upon the basis of events that have occurred since issuance of the complaint. The undersigned does not purport to pass upon or prejudge the merits of the complaint or the allegations of fact or theories underlying it. Further, the above recommendation and its certification to the Commission is not to be construed as authorizing or acquiescing in any cessation or slackening by the parties of their efforts to prepare for hearings in this matter.

The undersigned recognizes the novelty of making and certifying such recommendation to the Commission in the absence of a motion to that effect by a party. Nevertheless, in consideration of the enormous expenditure of time, effort and moneys that the preparation and adjudication of this case requires and all of the other matters that have been recited above, the undersigned would feel that he was derelict in the performance of his duties if he did not take this action.

Accordingly,

IT IS HEREBY ORDERED that the foregoing recommendation be, and it hereby is, certified to the Commission.


Alvin L. Berman
Administrative Law Judge

October 17, 1975

(footnote continued)

an outline of some 449 principal facts to be proven against each respondent, many of which do not appear to be affected by post-complaint events. The undersigned believes, however, that on the basis of the changes which have occurred since issuance of the complaint, as perceived by the Commission's staff, and in consideration of how those changes bear upon certain material factual allegations and theories underlying the complaint, a reconsideration of whether to proceed under the complaint is merited.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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MOBIL OIL CORPORATION, GULF OIL :
CORPORATION, SHELL OIL COMPANY :
and STANDARD OIL COMPANY OF : 75 Civ. 2748 (JMC)
CALIFORNIA, :

Plaintiffs, :

vs. :

FEDERAL TRADE COMMISSION, et al., :

Defendants. :

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April 29, 1977

Before:

Hon. John M. Cannella,
District Judge.

Appearances:

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.,
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By: Andrew J. Kilcarr, Esq.,
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ROBERT B. FISKE, JR., United States Attorney
for the Southern District of New York,
By: Nathaniel Gerber, Assistant U.S. Attorney.

ROGER B. POOL, ESQ.,
JOHN T. FISCHBACH, ESQ.,
Attorneys for Federal Trade Commission.

MR. GERBER: Good morning, your Honor. I am Nathaniel Gerber, Assistant United States Attorney, appearing on behalf of the movants in this matter.

The relief seeks in this application a stay pending appeal of this Court's decision of March 2, 1977, and also its supplemental memorandum decision of March 14, 1977, which directed the completion of that draft by September 12th of this year. As your Honor is aware, there are four criteria in determining whether a stay pending appeal should be granted. I would note that although the plaintiffs served responding papers on the U.S. Attorney's office last night, I did not get them until 9:30 this morning. I have not had an opportunity to study them, but at least we agree on what they are, the criteria, and they are: likelihood of success, irreparable injury to the appellee, irreparable injury to the appellant and the public interest as to the irreparable injury that would flow to the plaintiffs in granting the stay pending appeal.

Let me offer that the Court has ruled that no such injury would result from the granting of this stay when it denied plaintiffs' motion for an injunction pending the completion and filing of the environmental impact statement. The Court denied that application on the ground that as the Court noted -- notwithstanding plaintiffs'

1 interest in delaying Exxon to the the maximum extent
2 possible. No cognizable injury would befall plaintiffs
3 from the submission of documentary discovery to Exxon
4 pending the application of a draft EPA. Your Honor,
5 that will probably take some two years. We have concluded
6 that it will be followed by several years of depositions
7 and appeal in this case which could be taken and in all
8 probability resolved in a matter of months long before
9 the completion of documentary discovery. Thus we submit
10 it is clear and this Court has so ruled that no injury
11 would befall the plaintiff oil companies from the granting
12 of the relief that the Commission presently seeks and,
13 as we have demonstrated in our papers, should the decision
14 of this Court be upheld on appeal, ample time will remain
15 to comply with this Court's order long before the completion
16 of discovery.

17
18 As to the likelihood of success in the merits,
19 let me at the outset emphasize that in your opinion you
20 will notice that this Court declined to follow the decision
21 of the District of Columbia District Court in which the
22 D.C. Circuit declined to follow the position taken by the
23 Council on Environmental Quality, a council charged by
24 Congress with the carrying out of NEPA. Those opinions
25 are subject to great weight. There is at least a substantial

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possibility that the Second Circuit will take a different view as to the applicability to Exxon and follow the position taken by the Environmental Quality in this very proceeding. Given that chance, we submit that the Commission should be given the opportunity to exhaust the appeals process before engaging in a diversion of economic and manpower resources that would be necessary to comply with your Honor's order and also effectively cripple the prosecution of Exxon during the period of compliance.

There are additional reasons which indicate the strong likelihood of success on appeal.

As we explained in our papers, the Supreme Court held in *Klippy v. The Sierra Club* that NEPA, even if it is applicable to a particular governmental function, does not require an environmental impact statement until the federal action in question has at least reached the proposal stage, that the mere contemplation of such action does not trigger the EIS requirement. This Court held that NEPA was applicable to Exxon and required an EIS because of the magnitude of an environmental impact that would result from the granting of the relief requested by the Commission.

In fact, the Commission has never proposed any relief in Exxon.

THE COURT: Why did the judge write 16 pages on it

1 and the general public and the media and everybody's brother
2 say what are you doing with this case? Are they dreaming
3 or in Alice in Wonderland?
4

5 Are you saying you don't know the relief you
6 want to get in this case?

7 If you are, I think we ought to start counting--
8 technically they have not asked for it.

9 MR. GERBER: Correct. Not technically but in-
10 tentionally. They intentionally declined to offer any
11 relief.

12 THE COURT: That is what bugs me about these pro-
13 ceedings. They go on indeterminately because you don't
14 take a stand. You are going to do this or you are not
15 going to do it. The administrative law judge writes 16
16 pages on it and he says that he knows what the requests
17 are going to be. I am not too much mystified by it.

18 MR. GERBER: Your Honor, the final proposal of
19 relief depends upon the information that is gathered during
20 discovery and because of the magnitude of the Exxon pro-
21 ceeding that discovery willtake, in the words of the
22 administrative law judge, five years under the most favorable
23 of circumstances.

24 No final proposal of relief can be made until
25 that information is gathered, and complaint counsel, who

1 offered his tentative recommendation of relief at the
2 direction of the administrative law judge, stressed at that
3 very time in 1974 that those tentative recommendations
4 were predicated only upon the information that was available,
5 so that there is a magnitude of information yet to be
6 gathered before there can be proposal of relief by complaint
7 counsel. More important than that, in the Exxon proceeding,
8 the plaintiffs themselves, they are the respondents, and
9 they very vigorously asserted that any relief proposal in
10 Exxon would have to take into account intervening changes
11 in a variety of areas, government regulations, technological
12 development, acts by other nations, state regulations of
13 the depletion of oil resources. These things certainly
14 were not taken into account by complaint counsel in 1974,
15 and given the fact that the discovery will take five years
16 and the adjudication and then afterwards by the Commission
17 which will probably take several additional years, no one
18 can know what those changes will be and, if there are such
19 changes, what effect they will have upon a proposal of
20 relief that may be made by complaint counsel or by the
21 Commission. They have taken that position in the
22 Exxon proceeding and here they say that the proposal by
23 complaint counsel which there they say is not proper because
24 it does not take into account -- and here they say it is a
25

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final proposal mandating the preparation of EIS. There is no reason that the proposal made by complaint counsel in his prosecutorial capacity reflects the views of the Commission, particularly in this case, and the Commission declined to offer any proposal of relief. It never endorsed, improved or commented on the proposal offered by complaint counsel at the direction of the administrative law judge.

We submit that first of all on the Supreme Court decision in Klippy there has been no proposal of federal action within the meaning of statutory language of NEPA. Secondly, quite apart from that, as the Supreme Court also noted for practical reasons, there is no proposal of precision and definiteness that would warrant the preparation of an EIS. As the District Court in Colorado -- and I forget the name of the case -- but the preparation of an EIS where you don't have a proposal definite and concrete will result in a quagmire of hypothetical judgment, and that's precisely what will happen here.

Your Honor, there is no necessary likelihood that the Commission will adopt the proposals of relief proposed by the complaint counsel. Indeed there is no likelihood that the administrative law judge will adopt those proposals and forward them to the Commission. In fact, all you have is a statement by a prosecutor in the context of a litigation,

1 and plaintiffs come in and want to or ask this Court to
2 attribute that statement to the Commission which in the
3 context of Exxon functions exclusively as an appellate
4 tribunal. One can no more attribute the statements of
5 counsel in the Exxon proceeding than one can attribute the
6 statements of the federal prosecutor to the Federal Court,
7 and the distinction and role is not one of practice, but
8 found in the rules of the Commission and must be observed.
9

10 There can be no ex parte communication, for
11 example, between complaint counsel and the Commission in
12 the context of Exxon, so it is inconceivable that one can
13 realistically take a statement by complaint counsel in
14 prosecutorial capacity and attribute it to the Commission
15 and on that basis say that there is a final proposal.

16 Your Honor, we submit that the Supreme Court in
17 Klippy held that until such time that there is a proposal
18 of federal action, judicial intervention in administrative
19 proceedings is improper and unwarranted. That is not
20 to say that the agency has no obligation to consider
21 environmental factors during the course and formulation
22 of the proposal, which possibly could be argued
23 is the situation in Exxon, but the Supreme Court in Klippy
24 held that until the formulation of the proposal itself,
25 the Federal Court is not to become involved in the proceeding.

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2 THE COURT: You are not asking for a stay here,
3 are you?

4 MR. GERBER: Yes, pending appeal.

5 THE COURT: Aren't you saying that I should
6 change my decision?

7 MR. GERBER: No, your Honor. If we wanted
8 to do that, we would move for reconsideration.

9 THE COURT: It seems to me that's what you are
10 doing, but go ahead.

11 MR. GERBER: In order to demonstrate the strong
12 likelihood of success on the merits, we have to attempt to
13 convince you that there is a chance of error.

14 Your Honor, I don't want to be repetitive.

15 THE COURT: You can be as repetitive as you want.
16 I learn up here when you come in and tell me what it is all
17 about and I appreciate it. Repetition is one of the
18 principal ways of teaching. I'm not concerned with that.
19 It does not bug me because -- I threw you off your line of
20 argument. I got tired of seeing you reading from notes
21 or what is written on a piece of paper.

22 MR. GERBER: I think I have raised the most im-
23 portant points on the question of success on the merits
24 of appeal.

25 Let me say that we have raised other points in

the papers.

THE COURT: Doesn't the Court of Appeals have such an animal as an expedited appeal?

MR. GERBER: Yes, it does.

THE COURT: Will that be of help to you and then you don't have to go through all of this?

MR. GERBER: Your Honor, if in order to obtain the stay it is necessary to appeal on an expedited basis, we would do that, but I would point out one thing. This is a complicated case regardless of the merits.

It is a novel case as you noted in your decision. There is only one other case analogous to it, Gifford Hill. I submit that an expedited appeal would cut from 30 days to two weeks and the time to prepare briefs would not accomplish much when you think of the years that it will take to conclude discovery.

THE COURT: I think the extra time is not that much between the expedited appeal. This circuit is very good.

MR. GERBER: And one step further, we don't think the filing of briefs should be expedited. If the plaintiffs wanted to seek an expedited argument, we would have no objection so, in fact, it is only a matter of several weeks that would be gained by an expedited appeal.

On the issue of the merits, let me point out one

1 thing., that is that the Court held that the plaintiffs
2 had standing based upon their concern, based upon the
3 environmental injury that would flow to the plaintiffs
4 with the depletion of the nation's natural resources.
5 The Court did not consider whether or not plaintiffs
6 who exist solely as a corporation can in that capacity
7 assert environmental interests, as indeed they must to
8 acquire standing.
9

10 I would point out that at least two circuits
11 have squarely held that a corporation cannot assert as a
12 matter of law that type of particularized environmental
13 injury. Furthermore, in Sierra Club v. Norton which is the
14 leading case, the Supreme Court implicitly held that
15 plaintiffs would not have standing because of their
16 corporate status. In Sierra Club the Supreme Court stated
17 that unincorporated associations of individuals would have
18 standing where some of those individuals could demonstrate
19 to the Court the particularized interest necessary.

20 THE COURT: Walk Up The Trail, in the Sierra
21 case it was the Walk Up The Trail Club, and that's what was being
22 violated. They are trail walkers and they said that if
23 they had a couple of trail walkers it would be all right.

24 MR. GERBER: Let me go on to the question of
25 irreparable injury. First the injury that would flow to

1 the plaintiffs from the granting of the stay. We submit
2 if you granted this, no irreparable injury would be conferred
3 by the granting of the stay. Even if the Court does not
4 adopt that decision, it has rejected that decision. In its
5 decision your Honor stated that no cognizable injury --
6 and let me point out that the economic burden to these
7 corporations, among the nation's largest, of proceeding
8 in the Exxon litigation is not an interest that NEPA was
9 intended to protect, as the D.C. circuit pointed out in
10 Gifford Hill. The only injury would be that if during
11 the period of appeal there were to be an irretrievable or
12 irreversible commitment of resources which would preclude
13 the preparation of an environmental impact statement at
14 a later date; but if during the next five years at least
15 there will be only the gathering of information that is
16 necessary for the formulation of relief proposals and equally
17 relevant to the preparation of an EIS, there certainly
18 cannot be any irreversible commitment of resources.

19
20 Even if the Commission is rebuffed on appeal,
21 there will be more than ample time to comply with this Court's
22 order before the completion of discovery in Exxon and before
23 any adjudication is taken on the merits, let alone any
24 consideration given by the Commission as to what order
25 of relief it would formulate.

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1
2 On the other hand, if the Commission has to
3 comply with this Court's order, it would inevitably entail--
4 and this is a conservative estimate -- the diversion of
5 two-thirds of the Exxon staff and as much as half of the
6 available Exxon budget to prepare the EIS. I don't think
7 that there is any question but that would effectively
8 cripple the prosecution of Exxon.

9 If the Commission is successful on appeal those
10 resources cannot be recouped. It will have been spent and
11 the delay cannot be remedied. On the other hand, if the
12 plaintiffs are successful on appeal, as we have said, there
13 will be more than ample time to prepare the EIS before
14 there is any commitment of resources and under such cir-
15 cumstances there would not be any harm to the public in-
16 terest by the granting of this stay pending appeal insofar
17 as NEPA is concerned. But certainly the public also has
18 a strong interest in a timely prosecution in Exxon, parti-
19 cularly in this present day when energy considerations
20 are so important, and under such circumstances the public
21 interest will not be served by the denial of this stay
22 which would effectively cripple the time and prosecution
23 of Exxon.

24 For those reasons we request that the stay be
25 granted. Thank you.

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THE COURT: Does anybody else want to be heard?

MR. KILCARR: Good morning, your Honor. I am Andrew Kilcarr speaking on behalf of Mobil Oil Corporation and the other three plaintiffs in this proceeding. As mentioned to your Honor the last time, I am also counsel to Mobil Oil Corporation in the Exxon proceeding which is directly related to this activity in your courtroom.

Your Honor, may I speak first to what I believe especially to be this false concept of the Commission not proposing relief in these proceedings. Say false because in the context of this proceeding as well as in the context of the Exxon proceeding, that's a total irrelevancy, your Honor. I think as a matter of actual fact in my affidavit and the attached memorandum from the trial judge that that indicates that they have endorsed and commented on the literal relief proposal at work in the Exxon case, but that also is not that important.

What is important here, your Honor, is to be perceived out of your Honor's March 2nd opinion when you said that what is wrong in the Exxon case in light of NEPA is that environmental evaluations are not going to take place and parallel the antitrust evaluations that are going to go on during the life of that proceeding.

The decision making is not going to have

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environmental input. That is what's wrong with Exxon and that should be remedied. There is an explicit, relatively specific divestiture proposal as a matter of record in the Exxon proceeding that your Honor also perceives which is nationally if not internationally known as a divestiture proceeding. One speaks of the Exxon case as that being a divested proceeding and you would have your head in the sand if you said that is not a fact.

What your Honor set out to do, having found that the Federal Trade Commission violated NEPA by not having done the statement before issuance of the complaint, you set out to rectify that mishap and told them to get started on it immediately. Now they want a stay pending appeal. With due deference to my colleague from the U.S. Attorney's office, I suggest that two years does not sum up the time it is going to take to appeal from your Honor's March 2nd opinion and the subsequent order. Realistically, your Honor, I think we've said, if not believe--and I do believe this case is going to the Supreme Court and you are not going to have a final order until the Supreme Court of the United States decides or does not decide to take the case, and if they take it, we have the opinion of the Supreme Court. It is that new, fresh and compelling. Your Honor has said that NEPA applies to this unique antitrust

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2 enforcement action launched by the FTC. Your Honor
3 has not said what the court in the District of Columbia
4 said in connection with Gifford Hill.

5 Gifford Hill is a nickel and dime merger case,
6 a Section 7 case. The Exxon case is explicitly budgeted--
7 \$6,000,000 for one fiscal year to run. The Congress
8 of the United States has given to the Federal Trade Com-
9 mission, in connection with its total budget, \$6,000,000
10 to run this one case. There is no comparison between the
11 situation in Gifford Hill and the situation here, your
12 Honor.

13 If we look at this realistically, I suggest that
14 three or four years would be the more realistic projection
15 of what it is going to take to get a final order in this
16 case. What plaintiffs are concerned about is no environmental
17 activity going on at the Commission during that period
18 appeal, and that is precisely what the government wants,
19 no commitment to the environmental evaluation while the
20 appeal is progressing and ultimately, I suggest again,
21 through the Supreme Court. Your Honor, while this would
22 be going on, this juggernaut, this \$6,000,000 lawsuit that
23 gobbles up tens of millions of documents and hundreds of
24 deposition transcripts, it is going to continue, to
25 inexorably roll on and it is going to continue to do what?

1 It is going to continue to collect antitrust oriented
2 data and testimony. The government would have you believe
3 that in the process they will be picking up environmental
4 signals and that is essentially as I read the characteriza-
5 tion of the discovery, but, your Honor, that discovery
6 program was established long before you spoke. We have
7 been talking about discovery, this document discovery,
8 since last February. To come in now and say that there
9 are environmental implications here or we need this dis-
10 covery to do the EIS is disingenuous at the very least, your
11 Honor.
12

13 I suggest all anyone has to do in terms of
14 evaluating what is required by Section 1022C of NEPA is
15 simply read the Act and, your Honor, if you read this Act,
16 if anybody reads this Act, there is not a lick of information
17 required there that they have to get from my client or
18 from any of the other oil companies in the Exxon proceeding.
19 Look at part of C -- "Prior to making any statement
20 responsible several officials shall consult with or obtain
21 the comments of any federal agency which has jurisdiction
22 by law or special expertise with respect to any environmental
23 impact involved."

24 Your Honor, it is intriguing to me personally --
25 and on one of the supporting affidavits it had some lawyer

1 from the Federal Trade Commission making a host of phone
2 calls and contacts throughout the government to find out
3 what it would cost them and how long it took those people
4 in other governmental agencies to do environmental impact
5 statements. Those phone calls and contacts should have
6 been to find out what kind of input those agencies have
7 to the Federal Trade Commission's responsibility to do an
8 EIS in the Exxon proceeding. The calls were made to various
9 individuals in the federal energy situation and it sits
10 on the petroleum industry today and has since August of
11 1973. That is the type of agency that should look at the
12 Exxon complaint and what the relief in the Exxon case is
13 all about so that it can input to the Federal Trade Com-
14 mission in areas like alternatives to the proposed action.

15
16 Indeed, the very viability, the credibility of
17 that kind of relief, that kind of divestiture in connection
18 with the national oil policy of the United States which is
19 still emerging, still coming out, still could be implemented.
20 Judge Berman, our trial judge, as your Honor, on his own
21 wrote that 16-page memorandum of recommendations in October
22 of '75 to the Federal Trade Commission saying essentially,
23 is this really what you want to do? Do you really want
24 to pursue this case under this complaint in light of
25 what is going on throughout the world in terms of escalating

1 costs for the imported crude oil, in terms of the emerging
2 national energy policy, and he said, further, explicitly
3 do you really want to break up these companies? Is that
4 consonant with what is within the public interest of the
5 United States and thus in terms of the policy of the
6 United States? We submitted that as opposition to
7 this motion. I submit that it can be viewed from
8 that point of view, and that point of view is the Commission
9 creating this \$6,000,000 beast, if you will, and not
10 looking to the left or to the right to find out what the
11 real world is all about, but rather will continue on
12 this path.

13
14 I further submit, your Honor, that the treatment
15 that Judge Berman received is exactly comparable to the
16 treatment that your orders are receiving at the Commission
17 today. They are not taking the blinders off, not looking
18 at the real world and going right down that path. They
19 want to continue to do it. That is what the stay is
20 all about.

21 Now, one of the arguments made by the government
22 in support of this motion for a stay is the alleged de-
23pletion of the Exxon staff and the Exxon budget in the
24 Commission if they have to go out and do an environmental
25 impact statement. I was reminded when I first read that of

1 a judge that I had at the antitrust case in the Justice
2 Department. My betters were contending that we
3 do something to get ready for trial. The judge said to
4 us that the Justice Department, indeed the government, the
5 government of the United States has more manpower and more
6 resources than anybody else in this country and for the
7 government to contend that they cannot do any environmental
8 impact statement with a \$16,000,000 budget allocated to
9 a case and 20 or 25 lawyers already assigned to the case,
10 to me it is incomprehensible, your Honor, and indeed
11 there is nothing in the law, nothing in the charter of the
12 Federal Trade Commission that says the Federal Trade
13 Commission's attorneys and the Bureau of Competition
14 have to do this work. It can be done anywhere in the Federal
15 Trade Commission.

17 The important thing is that it get done and
18 get done soon or when it is done it is not going to be
19 worth anything at all. That is really the key point, your
20 Honor. Unless the schedule set out in your March 14th
21 order is allowed to continue, the whole concept of environ-
22 mental evaluation in the Exxon case is going to be overrun.
23 It is going to drown in a sea of antitrust documents and
24 antitrust testimony. It will not survive. I respectfully
25 suggest and emphasize that that is what is going to happen

1 because the appeal period is going to go on for so long
2 and the case will go on and the discovery which is now
3 escalating.
4

5 We are really in an accelerated time frame in
6 that case. If it does not happen now, by the time they
7 get around to it, which is their proposal, when they have
8 the record all made and when the Commission decides it,
9 we attend to the argument, that will be the one point
10 in time when it will make no difference. Everybody's minds
11 will be closed. I don't have to repeat to your Honor
12 your own language on the impropriety, the ineffectiveness,
13 the lack of utility of trying to run back and get environ-
14 mental concern when you have already made the record and
15 decision. That is what their papers are telling you today.
16 That is what Mr. Gerber's argument is all about. It is
17 "We will do it after we find them in violation of the
18 Federal Trade Commission Act." That is the worst time to
19 do it.

20 May I close with one point, your Honor, and a
21 point on irreparable harm. We are being told today that
22 the plaintiffs in this case before you who are respondents
23 in the Exxon case will suffer no irreparable harm if the
24 environmental impact statement preparation is postponed
25 during the pendency of the appeal. I disagree. I vigorously

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disagree with that because, your Honor, although I can tick off irreparable harm to the environment, the plaintiffs, the public -- let me focus on one thing. If the environmental impact statement were to commence now, indeed, as it should have commenced four years ago, it is possible, it is not unlikely that doing that work will demonstrate to decision makers at the Federal Trade Commission that this case should not go on. That indeed for the same reasons the national energy policy pointed out to the supervising authorities and trial judge that the case should not go on. Maybe if they do this work and take the blinders off and look at the real world they can figure out some other way to accomplish what they think their mission is and see what the petroleum industry is all about. Thank you.

MR. GERBER: Mr. Kilcarr has made many points. I would like to briefly comment on a few of them. First of all, Mr. Kilcarr states that the Commission has adopted the recommendations offered by complaint counsel in 1974. I think if you look at the underlined language in Mr. Kilcarr's affidavit, paragraph 7, which purportedly stands for that proposition, you will see that it does not. It says that the Commission has considered the law judge's recommendation and determined that the complaint should not

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23

be withdrawn. That is not at all inconsistent with the Commission's stated position in its notice of relief and in the affidavit of Mr. Dugan, the Acting Secretary of the Commission, that the Commission will not propose any relief in Exxon until after the adjudication on the merits is made. Mr. Kilcarr keeps on referring to how the public perceives the Exxon proceeding. It is very easy to call the Exxon proceeding a divestiture proceeding, as I have referred to it in my papers.

THE COURT: What about Mr. Dooley? Do you remember his remarks about the Supreme Court?

MR. GERBER: Was that made a long time ago?

THE COURT: You don't remember Mr. Dooley?

MR. GERBER: No, your Honor.

THE COURT: You also did not take Latin and Greek, did you?

MR. GERBER: Mr. Kilcarr repeats that the Commission does not know what the real world is and that the plaintiffs know what the real world is and if the Commission knew what the real world is, they would see that Exxon would not be prosecuted.

Apparently for the Commission to see the real world in Mr. Kilcarr's judgment they have to adopt the views of the Commission, but more the views of the plaintiffs

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2 and drop the Exxon proceeding. More important than that,
3 the real world here is that this proceeding has been one
4 of a series of steps to delay Exxon at every stage of the
5 game. That is what this Court noted in its decision.

6 THE COURT: I even note it today because I am
7 sitting here a month and a half after I told you to do
8 an EPA and can you tell me what you have done in the month
9 and a half?

10 MR. GERBER: I will ask Mr. Pool who is complaint
11 counsel to answer that question. He will be more familiar
12 with it.

13 MR. POOL: Your Honor, I am chief complaint
14 counsel at the Federal Trade Commission of the Exxon case.

15 Since your order we have proceeded with
16 a number of steps in response to that. We have, as Mr.
17 Kilcarr --

18 THE COURT: You made a telephone call and asked
19 how much it would cost. That's delightful.

20 Is that on the National Bank or what?

21 MR. POOL: They were to give us an idea of
22 the kinds of resources necessary. We tried to focus on
23 particular oil related impact statements by other govern-
24 mental agencies. What was not included in that affidavit,
25 because we did not think it was necessary, were inputs from

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25

those agencies of the kinds of consideration they thought we would need to take into account and the suggestions from them on the types of resources and those people with particular kinds of experience as well as the kinds of information that should be developed in preparation.

THE COURT: Did you tell those agencies that in my order I said that the EPA statement should be done by March 1 and that there are time limits here and that if they prepare reports, can it be expedited in any way?

MR. POOL: Your Honor, I did not make the phone calls and I don't know that that particular question was raised, so I'm not sure about that.

In addition to that, your Honor, as your Honor knows, we are in the middle of discovery now and I referred to the information in the affidavit that we are gathering in this discovery that we think will be helpful in environmental impact statements. We have obtained material about the ownership by respondents in various companies and refining operations that they have and their involvement with other companies and offshore activities.

THE COURT: Are you responsible for this EPA statement of the government?

MR. POOL: We would be the ones within the Commission who would have to be responsible for preparing it.

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2 THE COURT: How long would it take you to prepare
3 an EPA statement in your opinion if you have expertise
4 in that area?

5 The complete vacuum -- you go out and roam the
6 field without any lawsuits going on any place, and how
7 long would it take?

8 MR. POOL: There is a certain amount of uncertainty
9 involved.

10 THE COURT: I know it is a guesstimate, but
11 your guess is what?

12 MR. POOL: One of the reasons we think it is
13 necessary to obtain a substantial amount of information
14 from the plaintiffs in this case is that we think that
15 the kinds of questions they raise about the variety of
16 environmental consequences that could result -- that there
17 are many particulars about their operations that we don't
18 know -- and to consider the environmental consequences
19 of the proposals that we don't have, that requires knowing
20 about their operations. One of the difficulties we have
21 had, your Honor, as we stated in the affidavit, there are
22 really a host of alternatives that come within complaint
23 counsel's relief proposals, that because of the preliminary
24 nature of the case at the time we proposed the tentative
25 relief, we suggested in some general ways the kind of

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2 remedies we proposed. Namely, divestiture.

3 We did not say there should be divestiture of
4 pipe lines or refineries, but, instead, on the basis of the
5 information, we can only propose that there should be
6 divestiture of 40 to 60 percent of declining capacity
7 and certain firms. Again the alternatives, given the
8 fact that respondents themselves have roughly 34 refineries
9 within the relevant market, there are a lot of alternatives
10 that can be within our proposal. We feel we need additional
11 discovery to put them in a firm stage that would be the
12 basis of a firm proposal, the kind of discovery going on
13 in the balance of this case.

14 THE COURT: Are you keeping that in mind and
15 can you give me a guess now?

16 MR. POOL: It is going to be years I think
17 realistically in light of our discussions with other
18 agencies to put together a meaningful environmental impact
19 statement.

20 THE COURT: What does "years" mean to you?
21 Are you talking about one year, two years, three years,
22 ten years?

23 MR. POOL: I can't say at this point. As I say,
24 we try to take meaningful steps from your decision, your
25 Honor, and I think we are going to have to get into the

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process and if your Honor has deadlines we are going to proceed with all dispatch to conform with that order.

In terms of the other things we have done, as I stated in the affidavit, there were a number of consulting firms that in the past those governmental agencies have used in preparing environmental impact statements.

THE COURT: Suppose you do this for me, if you can remember. You have prepared EPA statements, have you not?

MR. POOL: No, your Honor. At the Federal Trade Commission there have been no environmental impact statements required in any proceeding and the Bureau of Competition, the part responsible for the antitrust statement, there have been no statements made within the Bureau of Competition. So far as we know there is no one in the Bureau of Competition who has any experience whatsoever in preparing these.

In fact, the Commission itself has prepared one and that was on a case with regard to a consumer protection and another bureau in the Federal Trade Commission. That was with regard to posting octane levels at gasoline pumps and some of the people that worked on that have departed. With regard to the Federal Trade Commission,

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2 there is hardly anyone at all with any experience.

3 THE COURT: I will hear you.

4 MR. GERBER: Your Honor, Mr. Kilcarr has stated
5 that this is a matter in which the appellate process
6 will take three or four years and that may well be because
7 apparently we both agree that the issues raised in this
8 case are novel and extremely important, but I think
9 that all this Court has to determine is whether or not
10 a stay has to be granted during the time it would take
11 for an appeal to be taken and argued before the Second
12 Circuit.

13 The Second Circuit, after hearing argument, can
14 determine at that point whether or not a stay should be
15 granted further up the ladder, but to speak in terms of
16 the total appellate process, that really is not relevant
17 to the limited relief we seek right now.

18 Finally, Mr. Kilcarr says he could tick off the
19 irreparable harm that would befall the plaintiffs. I
20 wish he had, because the irreparable harm that would befall
21 the plaintiffs is entirely economic. I realize that I'm
22 being repetitive, but it is an important point. It is not
23 only the Gifford Hill, Clinton Community Hospital case, the
24 Lotnick case which was distinguished by your Honor in your
25 decision. It is just about every case that I have found in

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NEPA dealing with plaintiffs asserting environmental concerns where their genuine interest is to protect their economic well being. In each such case I have found, with the exception of your Honor's decision, the courts have held that NEPA was not intended to be used as such a pool and, in fact, Mr. Kilcarr, the plaintiffs have never articulated a particularized environmental injury or particularized environmental interest that would be injured by the prosecution of Exxon.

THE COURT: They seem to have the same trouble you have. When you say that so many things can happen and you don't know what they are and if there are so many things that can happen that you don't know what they are, they are the same things that can happen to them.

What I am suggesting is that if there are so many things that are going to happen and may occur in the future, drop this and find out what is going to happen and then bring your suit. What is the big deal about that?

MR. GERBER: Because in order to find out what is going to happen, you have to gather the information, and given the delay in the course of discovery and you have the subpoena power, I submit, that we would never get that information if we dropped the lawsuit and voluntarily sought to get the information from the plaintiffs.

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2 This is a massive case.

3 THE COURT: Suppose they consented to it, let
4 us go in and look at anything you want in their organiza-
5 tion?

6 MR. GERBER: Your Honor, that is a possibility
7 that I cannot respond to right now.

8 THE COURT: I don't expect either of you to
9 respond to it. I expect both of you to think about it.
10 I think that will be a solution to some degree.

11 MR. GERBER: That would be contrary to the
12 entire history of discovery in the Exxon proceeding, but
13 be that as it may, the point is that there are many things,
14 variations, factors subject to change in Exxon. I have
15 enumerated them in my papers and I am not going to repeat
16 them here. But these are things that will be considered
17 in the course of discovery and in the course of adjudication
18 and only after all these things are considered will there
19 be a proposal of federal action within the meaning of
20 NEPA.

21 A statement by complaint counsel in a litigation,
22 and that's the only statement of relief that there is,
23 it is not a proposal of federal action within the meaning of
24 NEPA. We submit, your Honor, that particularly under
25 the circumstances of the case as mammoth as Exxon, it would

1 be a fruitless effort to prepare an environmental impact
2 statement predicated now upon proposals likely to change
3 as Exxon proceeds.
4

5 It would be hypothetical judgment based upon
6 hypothetical judgment based upon hypothetical judgment.
7 We submit, your Honor, that that would not serve the purposes
8 of NEPA.

9 MR. KILCARR: Your Honor, not so. Absolutely
10 not so. What we are talking about, what the Act talks
11 about is environmental input into government making. What
12 you have heard today from Mr. Pool, from his colleague,
13 Mr. Gerber, is a need for this massive discovery before
14 they can get ahold of their environmental responsibilities.

15 I suggest the Court think about hundreds or
16 thousands of environmental impact statements produced,
17 prepared, distributed by governmental agencies since 1969.
18 I suggest that not one single one of them required dis-
19 covery such as you are hearing today because that is not
20 the point.

21 On the go-in, what has to be assimilated by
22 the agency taking this major federal action, what do
23 the sister agencies in the federal government have to say
24 about it. What do state entities having expertise in
25 the field like the Texas Railroad Commission and supervisor

1
2 and pipe lines and wherewithal in Texas and the Public
3 Utilities Commission in the State of California, what do
4 they say about the divestiture proposal?

5 Another important concept that the Court should
6 not be misled into is that this environmental impact
7 statement does not have to be the final part of, does
8 not have to stand up 100 percent to all objections. It
9 does not have to offer everything. It starts the process
10 of environmental evaluation.

11 The cases are replete in describing that it is
12 not an impossible task, but the beginning of environmental
13 evaluation. If Exxon is going to go on for another five
14 years, then that statement will mature, change, it may
15 remain the same. But it will be targeted throughout the
16 five years of decision making that goes on in the Exxon
17 case. That's the purpose that it serves. It does not need
18 massive discovery.

19 Your Honor, in all fairness I respectfully
20 suggest if for whatever reason this Court should decide
21 to grant this stay pending appeal, and it is only fair
22 and it is only responsive to your own opinion that you
23 stay all of the pre-trial proceedings, all activity in
24 the Exxon case and shut down the Exxon case and shut
25 down their responsibilities under NEPA and let the

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2 appellate courts decide whether or not, as your Honor
3 has decided, that NEPA applies, when that is done then
4 we can start out afresh and most likely we will start down
5 the road, parallel roads of discovery for antitrust purposes
6 plus work on the environmental implications of this pro-
7 ceeding brought by the Federal Trade Commission.

8 If you are inclined to grant the stay pending
9 appeal and shut down the case per se, by the time the
10 appeal courts finally decide and we get that final order
11 back, everybody will have to stand back and then find out
12 what to do about the record that has been made during
13 the period while we were waiting for the courts of appeal
14 and the Supreme Court to decide. I suggest at that point
15 in time and given those circumstances we will have
16 demonstrably irretrievable and irreversible decision making
17 that will overrun any environmental consideration whatsoever
18 as of this whole proceeding. We are accused of being
19 dilatory and delay tactics, which is infuriating to this
20 advocate because we have this Court telling these people
21 that they did not comply with the law and we are being told
22 that we did this for dilatory reasons. But in any event,
23 by the time the appeal process is completed, if that discovery
24 goes on as is the desire of the Commission to have it
25 go on, this whole lawsuit and all of the appeals will turn

1 bjhh

2 out to be nothing more than an academic exercise.

3 Your Honor's order of March 2, 1977, will be
4 an effective nullity and it will all be for naught. We
5 will be on the road to an antitrust decision without
6 reference to environmental considerations in the Exxon case.
r3 7 For that reason, your Honor, we conclude by respectfully
8 requesting a denial of the stay as moved by the government
9 or if for any reason this Court grants that stay, then
10 as we did on March 9th we request that all proceedings in
11 Exxon be enjoined pending final decision on the Court of
12 Appeals on your Honor's basic decision. Thank you.

13 MR. GERBER: Your Honor, if I will be permitted
14 to respond briefly. First of all it is claimed that
15 all the plaintiffs really want here is to get the environ-
16 mental considerations into the process. I don't think that
17 is accurate. I think it would be accurate to say that
18 if the Federal Trade Commission is compelled to prepare
19 a draft EIS by September 12, 1977, and make no mistake,
20 if we are compelled to do so, we will make every effort
21 to comply with that, the plaintiffs will come in and
22 say that that is not adequate and we will be up and down
23 the course for several years. They don't want to get the
24 environmental considerations into process and more im-
25 portant than that, Mr. Kilcarr suggests that what is critical

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here is that the Commission consider environmental factors in the course of adjudication and discovery, yet the Supreme Court has held that an EIS need not accompany a proposal of agency action through the agency process. It need only be prepared at that point where the proposal becomes a final proposal within the meaning of NEPA. I would point out in the Aberdeen case, the Supreme Court stated that the decision, insofar as they held otherwise, it was contrary to the language of the statute and not only Aberdeen but it is Klippy as well where the Supreme Court again stated that a court is not to intervene in an agency process regardless of the merit of the argument that environmental factors should be considered in the formulation of proposal until that proposal is finally formulated by the agency and that judicial intervention is not appropriate.

We submit that is the case here. All we are asking for is that given the novelty of the issues raised, the fact that other courts have held the other way, the injury that would flow to the Commission from the termination of Exxon and the complete absence of any environmental injury whatsoever that would flow to the plaintiffs from the granting of the stay, that under such circumstances a stay pending appeal should be granted.

MR. KILCARR: Would your Honor indulge me for a

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2 brief moment? I think it is critical, your Honor, and
3 we think again in terms of the language of the court in
4 Jones v. D.V. Land Redevelopment Agency. "The harm with
5 which courts must be concerned in NEPA cases is not
6 strictly speaking harm to the environment but failure
7 of decision makers to take environmental factors in the
8 way that NEPA demands."

9 That is what this is about.

10 On page 32, you said, "Functional compliance
11 with impact statement process would require FTC's considera-
12 tion of environmental consequences at a time when it could
13 make a difference."

14 On page 39, "At the relief stage too great a
15 tendency to accept an inevitable adverse consequence thereby
16 nullifying their input into the decision making process."

17 Your Honor, you have decided these discussions
18 being argued to you today by the government.

19 THE COURT: I am aware of that. I am aware of
20 the fact also that I mentioned that this is in the nature
21 of a reargument rather than an argument for a stay.

22 I think you will agree that I gave you sufficient
23 time to express both your opinions in these matters. I
24 would assume at this point you have not run out of steam,
25 but you have run out of argument at this time.

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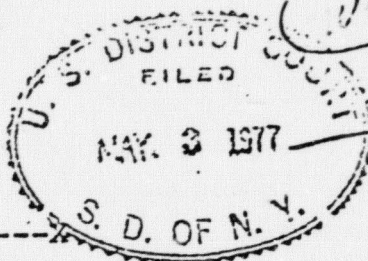
MR. KILCARR: Yes.

THE COURT: All right, I will reserve on this
and think about it. As soon as I do make up my mind,
you will be advised of the Court's decision. That is all.

Serber
75-2014

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



MOBIL OIL CORPORATION, GULF OIL
CORPORATION, SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,

MEMORANDUM
DECISION

Plaintiffs,

-against-

75 Civ. 2748
(JMC)

FEDERAL TRADE COMMISSION; and
LEWIS A. ENGMAN, Chairman,
PAUL RAND DIXON, Member,
MARY ELIZABETH HANFORD, Member,
STEPHEN NYE, Member, and MAYO J.
THOMPSON, Member and CHARLES A. TOBIN,
Secretary; as officers of the
FEDERAL TRADE COMMISSION,

Defendants.

-----X
CANNELLA, D.J.:

Motion for a stay of the Orders of this Court
dated March 2, 1977 and March 14, 1977, pending appeal
thereof to the United States Court of Appeals for the
Second Circuit, is hereby denied. Fed. R. Civ. P. 62.

On March 2, 1977, this Court ordered the Federal
Trade Commission ("FTC") immediately to begin preparing a
draft environmental impact statement ("EIS"), 42 U.S.C.

EX-11

§ 4332(2)(C), regarding the environmental consequences of the relief contemplated in the pending FTC adjudicatory proceeding entitled In the Matter of Exxon Corp., et al., Docket No. 8934 ("Exxon"). Upon denying plaintiff's subsequent application for a stay of the administrative action pending the Commission's compliance with the March 2 Order, the Court set a September 12, 1977 deadline for the preparation and distribution of the draft EIS. The Government now wishes to put off its compliance with the impact statement process, as ordered by the Court, pending appeal to the Second Circuit. Because the Court finds that, whereas the FTC will not be damaged irreparably should the stay be denied, both the plaintiff--and, more importantly, the public--may very well suffer irreparable harm should a stay be granted, the application for a stay is denied.

It is settled law that a party seeking a stay pending appeal under Rule 62 of the Federal Rules of Civil Procedure must meet the following four criteria:

- (1) a strong showing that he is likely to succeed on the merits of the appeal;
- (2) a showing that, unless a stay is

granted he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest.

Reserve Mining Co. v. United States, 498 F.2d 1073, 1076-77 (8th Cir.), application to vacate stay denied mem., 419 U.S. 802 (1974); accord, Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970); Belcher v. Birmingham Trust Nat'l Bank, 395 F.2d 685 (5th Cir. 1968); Eastern Air Lines, Inc. v. C.A.B., 261 F.2d 830 (2d Cir. 1958) (per curiam).

The Commission argues that the diversion of funds and manpower necessary to prepare an EIS at this time will severely impede the prosecution of Exxon. Moreover, the FTC strongly asserts the wastefulness of these expenditures should the Court's decision be reversed on appeal. While the Court is not unmindful of the burdensome task that its Orders present to the Commission, it does not find such costs to constitute irreparable injury. If the Government is correct in its allegation that much of the discovery in Exxon is equally necessary to the preparation of an EIS, it follows that much of the material gathered for the EIS will be equally valuable to the

prosecution of Exxon. Additionally, should the court of appeals conclude that an EIS was not statutorily required in this case, the information learned from the EIS can be of tremendous aid to the Commission if and when the relief stage of Exxon is reached. Thus, preparation of an EIS, even if ultimately held to have been unnecessary, will not result in nearly as much waste as the FTC argues.

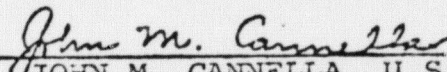
With reference to the third and fourth criteria listed above, the Court finds that a stay pending appeal might cause irreparable harm to both the plaintiffs and the public. In its March 14 Memorandum the Court found that the "production of documents" stage of discovery could have no direct effect on the environment such that it should be enjoined pending the Commission's filing of a draft EIS. To ensure that the prosecution of Exxon not extend beyond that stage of discovery without the benefit of an EIS, the Court set a September 12, 1977 deadline for the preparation and distribution of the draft. The FTC now argues that, in line with the above finding, a stay pending appeal could not possibly injure the environment. It avers that the Second Circuit will no doubt render a decision early enough so that, should the district court decision of March 2 be affirmed, a

draft EIS still could be prepared before the relief stage of Exxon.

While the Commission's position has superficial appeal, the Court rejects it as unrealistic. Plaintiffs argue that the Second Circuit will not be the final arbiter of this controversy and that a stay entered at this time might not be vacated for three or four years. Given the novelty, complexity and significance of the questions presented by this case, plaintiffs' prophesy seems well-founded. Additionally, the March 14 Order permitted Exxon to proceed for approximately six months without the benefit of an EIS, while the granting of a stay would multiply this time span many-fold. The Court is therefore unwilling and unable to run the risk that at some future date, if and when it is decided that Exxon should not have been instituted sans EIS, compliance with the Court's decision would be a meaningless exercise.

Accordingly, the Court, although realizing that a reversal on appeal is more than a remote possibility, finds that the Government has not made a sufficient showing for a stay pending appeal, and the motion is hereby denied.

SO ORDERED.



JOHN M. CANNELLA, U.S.D.J.

Dated: New York, N.Y.
May 3, 1977.

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 77-6073

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

15th day of July 19 77 s he served ~~two copies of the~~
~~within~~ 2 copies of page proofs of govt's brief and 2 copies of the
joint appendix

by placing the same in a properly postpaid franked envelope
addressed:

Donovan, Leisure, Newton & Irvine, Esqs.,
30 Rockefeller Plaza,
New York, NY 10020

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Pauline P. Troia

15th day of July, 19 77

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1979

